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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~185~~. 195

THE UNITED STATES, APPELLANT,

vs.

THE WINCHESTER AND POTOMAC RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 1, 1892.

(15220.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 485.

THE UNITED STATES, APPELLANT,

vs.

THE WINCHESTER AND POTOMAC RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

THE WINCHESTER AND POTOMAC RAILROAD Company.
vs.
THE UNITED STATES.
} No. 16603.

I.—*Petition, in which is set out the letter of Secretary of Treasury, transmitting case under section 1063, Revised Statutes, filed June 24, 1889.*

To the honorable the judges of the Court of Claims:

The petition of the Winchester and Potomac Railroad Company respectfully shows:

1. That it is a corporation incorporated under the laws of the State of Virginia.

2. That it owns a line of railroad running from the City of Winchester, in Frederick County, in the State of Virginia, to the town of Harper's Ferry, in the County of Jefferson, in the State of West Virginia, the length of the road being thirty-two miles, of which about ten miles are in the State of Virginia and about twenty-two miles are in the State of West Virginia, and has owned it since the year 1832.

3. That sometime in the spring of 1862 the said railroad, with its entire equipment, was taken possession of by the military authorities of the United States under an order of the Honorable E. M. Stanton,
2 Secretary of War, and was operated under the direction of the War Department until the fall of 1862, when it was relinquished to the company, but within a few months thereafter possession thereof was resumed by the Government and retained until the 20th day of January, 1866, during all of which time it was used and operated as a United States military railroad. On the 20th of January, 1866, it was restored to its owners.

4. That the capital stock of the company was, during the period when the road was held by the Government, and is still largely owned by citizens of States who during the war remained loyal to the United States Government.

5. That the hard usage to which the road and roadbed was subjected in the constant movement of troops and munitions of war necessitated its repair by the Government, and this was accomplished in 1864 by substituting for the rails then on the road a quantity of rails taken from the roadbed of the Orange, Alexandria and Manasses Railroad. The rails which were removed were sent to Alexandria, Virginia, and were there stored in a Government storehouse.

6. That at the end of the war, as is hereinbefore stated, the Government was in possession of your petitioner's road, as also of all railroads in the Southern States. These roads were absolutely essential to the public service, and the Government was compelled to operate them until some one could be found to whom they could be lawfully surrendered, and who, at the same time, was able to operate them.

Indeed so great had been the expense to the Government of operating them that immediately upon the cessation of hostilities the subject was brought to the consideration of the honorable Secretary of War by the

Quartermaster-General. The expense to the Government of operating these roads was at that time upwards of $1,300,000 monthly. (See p. 6, Record.)

3 Moreover the Government was indebted to the companies for the use of their roads, which was every day becoming greater and greater, and also for all rolling stock and materials which it had appropriated.

In this state of affairs some settlement of the accounts between the Government and the roads become absolutely necessary, and a settlement to be submitted for company's acceptance, was agreed upon between the honorable Secretary of War and the Quartermaster-General. The terms of this settlement appear from two letters from the Quartermaster-General to the Secretary of War, and his endorsement thereon (Record, p. 4, 5, and 6), the one dated May 19th, 1865, and the other dated July 17th, 1865.

7. That the settlement thus offered is to all the railroads "in the States lately in rebellion," and is as follows:

1st. The company must "be able to operate" its road "in such manner as to secure the speedy movement of all military stores and troops." (Record, p. 4.)

2nd. The company is not to be charged "for expense of material or expense of operation." (Record, p. 4.)

3rd. All material lying along the line of the road is to be given up to the company. (Record, p. 4.)

4th. "All rolling stock and material the property before the war of railroads and captured by the forces of the United States to be placed at the disposal of the roads which originally owned it, and to be given up to these roads as soon as it can be spared, and they appear by proper agents authorized to receive it." (Record, p. 5.)

5th. The Government is to be released from all "payment or credit * * * for its occupation or use by the United States during the continuance of the military necessity, which compelled the United States to take possession of it by capture from the public enemy. The recov-

4 ery of the road from the public enemy and its return to loyal owners, and the vast expense of defence and repair, are a full equivalent and more than an equivalent for its use."

8. That upon the terms offered in these letters, on the 20th January, 1866, your petitioner accepted the surrender of its road, and the same constituted, as your petitioner is advised, an agreement between itself and the Government.

9. That immediately upon its recovery of its road your petitioner, caused diligent search to he made for property belonging to it, and it found, among other things, a quantity of old iron rails, in amount $507\frac{1}{2}\frac{9}{2}\frac{4}{4}\frac{0}{0}$ tons, in the Government storehouse in Alexandria, Virginia, which it fully identified as its property.

Your petitioner thereupon, through its president, Robert Y. Conrad, esq., at once made demand formally upon the Quartermaster-General for this iron, but before the demand was complied with the Orange, Alexandria and Manasses Railroad Company made claim for the same iron upon the ground that its (the O., A. & M.) iron had been put on your petitioner's road, and was still there and was unpaid for. The Quartermaster-General gave heed to this demand of the O., A. & M. road, and deferred delivering

up the said iron to either company until they had settled their differences between themselves. Pending the delay incident to the controversy between the two companies, there was a public sale of Government stores, and this iron, along with other stores, was sold and brought at public auction the sum of thirty thousand three hundred and eighty-seven $\frac{92}{100}$ dollars, which said sum was used by the Quartermaster's Department in payment of the current expenses of the Department. See claim, filed by Robert Y. Conrad, president, and two endorsements thereon, (pp. 8 and 9, Record).

Letter from the Hon. Secretary of War (p. 9 Record), in which
5 he says the petition of Mr. Conrad is that his road shall be delivered up on the same terms on which other railroads have been transferred," and the two endorsements thereon, (p. 9 Record).

Letter from Quartermaster-General to John W. Garrett (p. 11 Record).

Report of Quartermaster-General to Secretary of War (pp. 12 to 16, Record).

Deposition of Robert Y. Conrad (pp. 33, 34, Record).

10. That the controversy between the Orange, Alexandria and Manasses Company and your petitioner continued to the fall of the year 1873, during which time two or more suits were instituted and earnestly contested, one of which was carried to the supreme court of appeals of Virginia by your petitioner, the decree having been adverse to it in the court below, and finally their differences were compromised by your petitioner paying the said O., A. & M. Co. a large sum of money in full discharge of all indebtedness due to it.

That the settlement of this controversy and the payment to the O., A. & M. Co. took place about the latter part of 1873, or early in 1874.

11. That during all this time, and, indeed, at the present time, your petitioner's road was, and is being, operated by the Baltimore and Ohio Railroad Company under a lease, and a short time after the settlement of the differences between the O., A. & M. Co. and your petitioner, Mr. John W. Garrett, as president of the B. & O. road, lessee of the W. & P. road, renewed your petitioner's demand upon the Quartermaster-General for the proceeds of the iron, so sold under his direction. This last demand was made on the 2nd day of December, 1875 (Record, p. 11).

From the said 2nd day of December, 1875, until the filing of this petition your petitioner has been pressing its claim, first before the Quartermaster-General, then before the honorable the Secretary of War, then
before the 3rd Auditor, and then before the 2nd Comptroller of
6 the Treasury, and on the 9th day of March, 1889, the last named certified the said claim to the honorable the Secretary of the Treasury as one "involving disputed facts and controverted questions of law," and the same has been transmitted to this honorable court with all vouchers, papers, documents, and proofs connected therewith for trial and adjudication under Revised Statute 1063.

The letter of transmittal (Record, p. 2) is as follows:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 12, 1889.

To the chief justice and judges of the Court of Claims:

Under the provisions of section 1063 of the Revised Statutes of the United States. I herewith transmit to your honorable court, upon the cer-

tificate and recommendation of the Second Comptroller, the claim of The Baltimore and Ohio R. R. Co., as lessees of The Winchester and Potomac R. R. Co., against the United States, with all the vouchers, papers, proofs, and documents pertaining to said claim, for trial and adjudication as provided by law.

The Secretary is in doubt whether the Department has jurisdiction of the claim herewith transmitted, and the question of jurisdiction and authority to transmit the same to your honorable court is therefore submitted with the other questions in the case.

Respectfully, yours,

HUGH S. THOMPSON,
Acting Secretary.

And the letter from the Second Comptroller to the Secretary of the Treasury is as follows (p. 2, Record):

7

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Washington, D. C., March 9th, 1889.

HON. WILLIAM WINDOM,
Secretary of the Treasury:

SIR: In pursuance of the provisions of section 1063 Revised Statutes, I hereby certify that the claim of the Baltimore and Ohio R. R. Co., as lessees of the Winchester and Potomac R. R. Co., against the United States, now pending in this Department—claim No. 84,338—is one that involves disputed facts and controverted questions of law; questions that this office has not the proper means to examine and determine; and that the amount in controversy exceeds three thousand dollars.

I therefore transmit herewith all the vouchers, papers, proofs, and documents pertaining to said claim on file in this office, being thirty-three separate papers as set forth in the "list" hereto attached, with request and recommendation that the case be transmitted, with all said vouchers, papers, documents, and proofs, to the Court of Claims for trial and adjudication.

Very respectfully,

SIGOURNEY BUTLER,
Comptroller.

That no assignment or transfer of said claim, or of any part thereof, or interest therein, has been made; and that said petitioner is justly entitled to the amount hereinafter claimed from the United States, after allowing all just credits and offsets.

Wherefore your petitioner prays that the sum of thirty thousand three hundred and eighty-seven $\frac{39}{100}$ dollars (p. 16, Record) may be found to be due it on account hereof, and that the United States is liable therefor.

(Signed) WM. R. DENNY,
Act'g. Prest. W. & P. R. R. Co.
FRANK P. CLARK,
Atty. for Petitioner.

8 STATE OF MARYLAND,
City of Baltimore, ss:

Personally appeared before me, a notary public of the State of Maryland, in and for the city of Baltimore, William R. Denny, whose signature is appended to the foregoing petition, and who made oath in due form of law that he is the acting president of the Winchester and Potomac Railroad Company, the petitioner in this case, and that the matters and things averred in the said petition on his own personal knowledge are true, and that those stated on information and belief he believes to be true.

In testimony whereof I have hereunto set my hand and official seal this 22 day of June, 1889.

[SEAL.] (Signed) MURRAY HANSON, *N. P.*

9 II.—*Traverse—Filed June* 25, 1889.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

10 III.—*Findings of fact and conclusion of law—Filed November* 7, 1892.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was in 1862, and is now, a body corporate, owning a line of railroad running from Harpers Ferry, in the State of West Virginia, to Winchester, in the State of Virginia, and had owned the same for many years prior to 1862. The road was 32 miles in length, of which 22 were in the State of West Virginia and 10 in the State of Virginia. The capital stock of the company was largely owned by citizens of loyal States.

II.

Some time in March, 1862, the military authorities of the United States took possession of, repaired, and held the road, except at intervals, until January 20, 1866. During that period the Government had the exclusive use of it for military purposes, received all tolls and revenues, and used the same for Government purposes.

In repairing said road the United States removed a quantity of strap rails and put in their place "T" rails, taken from the Manassas Gap

Railroad Company, which remained upon said road at the time of its surrender by the United States to the Winchester and Potomac Railroad Company, January 20, 1866. The rails so removed were stored in Alexandria, Va. The United States has never paid anything for its use, nor has it ever accounted to the claimant for the revenues of the road which it collected and appropriated, nor for said rails so removed. Immediately upon the restoration of the roads to their respective companies, the Manassas Company made demands upon the Winchester and Potomac Company for the iron so laid upon its road, or for its value, and its demand not being complied with, it brought suit and obtained a judgment for the value thereof, which judgment was in 1873 or 1874 settled by a compromise, the Winchester and Potomac Company paying the Manassas Company the sum of $25,000.

III.

At the time of taking of the road by the United States it was being used and operated by said company for the use and benefit of the
11 Confederate States, in the transportation of troops, munitions of war, and other subjects of transportation as required by the Confederate States, in pursuance of a written contract executed between Frank P. Clark, captain and acting quartermaster, Confederate States Army, and William L. Clark, president of Winchester and Potomac Railroad Company, on the 11th day of September, 1861.

IV.

In May and July, 1865, the Quartermaster-General addressed letters to the Secretary of War, which, so far as material in this case and the approval of the Secretary of War, are as follows:

QUARTERMASTER-GENERAL'S OFFICE,
Washington, D. C., May 19, 1865.

SIR: I have the honor to enclose certain papers relative to the Orange and Alexandria Railroad. * * *

* * * The question of the disposition of the railroads in the States lately in rebellion is a large one; and after reflection, I have the honor to advise that the following principles be established to govern the Quartermaster's Department and of the military authorities in disposing of all of them:

1st. The United States will, as soon as it can dispense with the military occupation and control of any road of which the Quartermaster's Department is now in charge, turn it over to the parties asking to receive it who may appear to have the best claim, and be able to operate it in such manner as to secure the speedy movement of all military stores and troops; the Quartermaster-General, upon the advice of the military commander of the department, to determine when this can be done, subject to the approval of the Secretary of War.

2nd. No charge to be made against the railroad for expense of material or expense of operation.

3rd. All materials for permanent way used in the repair and construction of the road, and all damaged material of this class which may be left along its route, having been thrown there during the operation of destruction or repair, to be considered as part of the road and given up with it.

4th. No payment or credit to be given to the railroad for its occupation or use by the United States during the continuance of the military necessity which compelled the United States to take possession of it by capture from the public enemy. The recovery of the road from the public enemy and its return to loyal owners, and the vast expenditure of defense and repair, are full equivalent and more than an equivalent for its use.

5th. All movable property, including rolling stock of all kinds, the property of the United States, to be sold at auction, after full public notice, to the highest bidder.

6th. All rolling stock and material, the property before the war of railroads, and captured by the forces of the United States, to be placed at the disposal of the roads which originally owned it, and to be given up to these roads as soon as it can be spared, and they appear by proper agents authorized to receive it.

7th. When a State has a board of public works able and willing to take charge of its railroads, the railroads in the possession of the Quartermaster's Department to be given up to this board of public works, leaving it to the State authorities and the judicial tribunals to regulate all questions of property between said boards, agents, or stockholders.

8th. Roads not being operated by the United States Quartermaster's Department not to be interfered with unless under military necessity. Such roads to be left in possession of such persons as may now have possession, subject only to the removal of every agent, director, president, superintendent, or operator who has not taken the oath of allegiance to the United States, which rule should be rigidly enforced.

9th. When the superintendents in actual possession decline to take such oath, some competent person to be appointed as receiver of the railroad, who shall administer the affairs of the road and account for its receipts to the board of directors, who may be formally recognized as the legal and loyal board of managers. This receiver to be appointed, as in the case of other abandoned property, by the Treasury Department. * * *

I have the honor to be, very respectfully,

M. C. MEIGS,
Bvt. Maj. Gen., Qr. Mr. General.

12 QUARTERMASTER-GENERAL'S OFFICE,
Washington, D. C., July 17, 1865.

SIR: I submit herewith an estimate for funds required by the disbursing officers for railroads at Nashville, Tenn.

* * * * * * *

It will be perceived from the aforegoing statement that these railroads have been costing, during the present year, upwards of $1,300,000 monthly, and the expenditures are still going on.

These expenditures were necessary during the war, but it appears to me that the Government should be relieved from this heavy expen-

ditures by the restoration of the railroads to the companies, and I recommend that this be done as soon as it is possible to make arrangements for the transfer on the basis of my report of 19th of May last.

The appropriation for transportation of the Army is exhausted, and there is no money in the Treasury for Army appropriation against which requisitions can be drawn.

Very respectfully, your obedient servant,

M. C. MEIGS,
Bvt. Major-General U. S. A., Qr. Mr. General.

Hon. E. M. STANTON,
Secretary of War, Washington, D. C.

The recommendation of the Quartermaster-General is approved, and he is directed to turn over the roads immediately.

By order of the Secretary of War.

THOMAS T. ECKERT,
Acting Assistant Secretary of War.

WAR DEPARTMENT, *July* 26, 1865.

V.

These letters were followed by the following executive orders:

WAR DEPARTMENT,
Washington, August 8th, 1865.

Major-General GEORGE H. THOMAS,
Commanding Military Division of Tennessee, Nashville, Tennessee:

GENERAL: It having been determined by the Government to relinquish control over all railroads in the State of Tennessee, and their continuations in adjoining States, that have been in charge of and *our* now occupied by the United States military authorities, and no longer needed for military purposes, you are hereby authorized and directed to turn over the same to the respective owners thereof at as early a date as practicable, causing, in all cases of transfer, as aforesaid, the following regulations to be observed and carried out:

1. Each and every company will be required to reorganize and elect a board of directors, whose loyalty shall be established to your satisfaction.

2. You will cause to be made out in triplicate, by such person or persons as you may indicate, a complete inventory of the rolling stock, tools, and other materials and property on each road.

3. Separate inventories will be, in the same manner, made of the rolling stock and other property originally belonging to each of said roads, and that furnished by and belonging to the Government.

4. Each company will be required to give bonds satisfactory to the Government that they will in twelve months from the date of transfer, as aforesaid, or such other reasonable time as may be agreed upon, pay a fair valuation for the Government property turned over to said companies, the same being first appraised by competent and disinterested parties at a fair valuation, the United States reserving all Government dues for carrying mails and other service performed by each company until said obli-

gations are paid, and if at the maturity of said debt the amount of Government dues, retained as aforesaid, does not liquidate the same, the balance is to be paid by the company in money.

5. Tabular statements will be made of all expenditures by the Government for repairing each road, with a full statement of receipts from private freights, passage, and other sources; also a full statement of all transportation performed on Government account, giving the number of persons transported, and amount of freight, and the distance carried in each case, all of said reports or tabular statements to be made in triplicate, one each for the Secretary of War, the military headquarters of the department, and the railroad company.

13 6. All railroads in Tennessee will be required to pay all arrearages of interest due on the bonds issued by that State prior to the date of its pretended secession from the Union to aid in construction of said roads before any dividends are declared or paid to the stockholders thereof.

7. Buildings erected for Government purposes on the line of railroads, and not valuable or useful for the business of said companies, should not form a legitimate charge against such companies, nor should they be charged for rebuilding houses, bridges, or other structures which were destroyed by the Federal Army.

8. You are authorized to give any orders to quartermasters within your division which you may deem necessary to carry into execution this order.

By order of the President:

EDWIN M. STANTON,
Secretary of War.

WAR DEPARTMENT,
Washington, D. C., 14th October, 1865.

Major-General GEORGE H. THOMAS,
Commanding Military Division of the Tennessee,
Headquarters Nashville, Tennessee:

GENERAL: The provisions and benefits of the executive order of 8th August are hereby extended to all railroads within the limits of your command desiring to purchase railroad rolling stock and material from the United States for the purpose of repairing the losses of the war.

You are also authorized to direct the sale to any such railroads of rolling stock now within the limits of your command, and not needed by the United States for actual use, upon the following conditions, if they are preferred to the terms of the order of 8th August and the individual security required by you under that order.

You will take care that this property is distributed among the several roads in proportion to their actual needs, and that none is sold to any railroad in excess of the reasonable requirements of its business or to be used for purposes of speculation, sale, or hire to other roads.

You will require from all such railroad companies satisfactory bonds, in the form herewith enclosed, binding them to the payment to the United States of the full appraised value of the property sold to them, in equal monthly installments, with interest at the rate of seven and three-tenths per cent per annum, within two years, credit being allowed to them, on the

first of each month, for any service of military transportation rendered by them during the preceding month at the established rates now allowed to Northern railroads for such service.

Full reports of all sales under this order will be made to the War Department from time to time, as required by existing orders.

The serviceable railroad iron in possession of the quartermaster's department at Chattanooga and Nashville is excepted. It will be sold only for cash at the prices fixed by the War Department.

By order of the President:

EDWIN M. STANTON,
Secretary of War.

VI.

In reply to the oral application of the claimant, November 16, 1865, to have its road restored, the following action was taken:

WAR DEPARTMENT,
Washington City, Nov. 16, 1865.

GENERAL: Mr. Conrad, president of the Winchester and Potomac Railroad, applies to have that road transferred to him on the same terms on which other railroads have been transferred. I understand that the road is partly in the State of Virginia and partly in the State of West Virginia, so that it can not properly be turned over to the board of public works of the former State. The matter is referred to you for such arrangement and recommendation as you deem proper on the facts of the case.

Yours, truly,

EDWIN M. STANTON,
Sec. of War.

Brevet Major-Gen'l M. C. MEIGS,
Qr. Mr. Gen'l.

[1st indorsement.]

Respectfully returned to the Secretary of War.

I recommend in the case of the Winchester and Potomac Railroad that as the president of the road now comes forward on the part of the company and applies to have the road transferred to him, that this be done,
14 and that in making the transfer the company shall be admitted to the privileges of the executive order of 14th of October last, as has been done in the case of the Wilmington and Weldon Railroad of North Carolina.

General McCallum, in charge of military R. R'd's, to carry this into effect. All rolling stock and railroad materials upon that road which the company may not elect or purchase to be sold, as soon as preparations can be made, at public auction.

M. C. MEIGS,
Qr. Mr. Gen'l, U. S. A., B'v't Maj. Gen.

Q. M. G. O., *Nov.* 16, '65.

[2d endorsement.]

Returned to the Quartermaster-General with directions to turn over this road to the company.

By order of the Sec'y of War:

THOS. T. ECKERT,
Act'g Ass't Sec'y of War.

WAR DEP'T, *Dec.* 14, '65.

QUARTERMASTER-GENERAL'S OFFICE,
Washington, D. C., Dec. 5th, 1865.

To General MEIGS,
Quar. Mas. Genl.:

SIR: In pursuance of my application, verbally made about the 16th Nov. last, I have the honor now to ask your favorable consideration to the wish of the Winchester and Potomac Railroad Company to have their road (from Harpers Ferry in W. Va., to Winchester, Va.) delivered up to the board of directors of the company, the same being now used as a military road.

Very respectfully,

ROB'T Y. CONRAD.
Pres't W. and P. R. R. Co.

[1st endorsement.]

QUARTERMASTER-GENERAL'S OFFICE,
Washington, December 15th, 1865.

Respectfully referred to Br'v't Brig. Gen. D. C. McCallum, general sup't Mil. R. R., Washington, D. C., who will turn over this road (the Secretary of War having so directed) to the Winchester and Potomac Railroad Co., Robert Y. Conrad, president.

The company will be admitted to the privileges of the Executive order of October 14th.

All rolling stock and R. road material upon the road which the company may not elect to purchase will, unless otherwise directed, be sold at public auction as soon as preparations can be made.

By order of the Quartermaster-General:

ALEXANDER BLISS,
Br'v't Col. and A. Q. M., in charge 4th Div.

[2d endorsement.]

QR. MR. GENL'S OFFICE, *Dec. 15th,* 1865.

General M. C. Meigs directs that the Winchester and Potomac R. R. to be turned over to the Co., Rob't Y. Conrad, pres't, the Co. to be admitted to the privileges of Ex. order of Oct. 14.

OFFICE DR. AND GEN. MANAGER, MIL. R. R'DS U. S.,
Washington, D. C., Jan'y 12th, 1866.

Mr. J. J. MOORE,
Chf. Eng. and Supt. Mil. R. R'ds of Va., Alexander, Va.:

SIR: Mr. I. H. Sherard, prest. of the Winchester and Potomac R. R'd Company, in a letter to this office dated Jan'y 10th, 1866, states that the company declines purchasing any of the property of the U. S. now upon

that road, but are prepared to receive the transfer of the road to them at once, and names Monday next as the time he would like to meet you for that purpose. They have made arrangements with the B. & O. R. R'd Co. to run it for the present.

Mr. Wilson was anxious to accompany you to Harpers Ferry when you went.

Very respectfully, &c.,

D. C. McCALLUM,
Bvt. Brig. General, &c.

15 VII.

The claimant company made arrangements with the Baltimore and Ohio Railroad Company by which it leased its road, rolling stock, and other property to the latter company from the 1st day of January, 1866, although the written lease was not signed until the following July.

The road was thereupon (January 16, 1866) turned over under the aforesaid orders, and was taken possession of by the Baltimore and Ohio Railroad Company, lessees, and thereafter run by the latter company.

VIII.

In regard to the disposition of the iron removed from the claimant's road and stored as stated in Finding I, the following proceedings took place:

November 16, 1865, the following letter was written:

WASHINGTON, D. C., *Nov.* 16, 1865.

To Brevet Brig. Gen. D. C. McCALLUM,
Director and Gen'l Manager Mil. R. R'd's U. S.:

SIR: The undersigned, president of the Winchester and Potomac Railroad in Virginia, has the honor to represent: We are informed that a quantity of the iron from our road—flat or strap bar—is now in possession of your department at Alexandria, Va., which we are anxious to recover, as we hope the road is about to be returned to the company.

We respectfully request that the fact may be inquired into, and, if proper, an order made to return the said iron to my order as president of the company.

Your ob't servant,

ROBT. Y. CONRAD,
President.

To this application no answer was ever returned, nor were any affidavits or other proof of the ownership or value of the iron mentioned nor of any of the other facts therein alleged offered to or filed in any Executive Department of the Government prior to the 11th day of May, 1885, when the Baltimore and Ohio Railroad Company made the written application mentioned in Finding X.

At or about the time said letter from Mr. Conrad was written, he made also an oral application to the Quartermaster-General for the same.

(B) Said iron, with a large quantity of other iron, amounting in all to more than $2,000,000, was sold at auction. The claimant's iron sold for

the sum of $30,240, and was paid for January 9, 1866. The proceeds were used for the benefit of the United States through the War Department.

IX.

On December 2, 1875, Mr. J. W. Garrett, president of the Baltimore and Ohio Railroad Company, addressed the following letter to the Quartermaster-General:

BALTIMORE AND OHIO RAILROAD COMPANY,
OFFICE OF THE PRESIDENT,
Baltimore, December 2, 1875.

General RUFUS INGALLS,
Actg. Quartermaster-General U. S. A., Washington, D. C.:

SIR: Subsequent to the termination of the late war the United States military railroad authorities sold a quantity of old rails in Alexandria, Va., which had been taken from the line of the Winchester and Potomac Railroad.

16 I have the honor to request that you will furnish me with the dates the said rails were sold, the quantity sold, the price per ton, the amount realized from the sale of the rails taken from the line of the Winchester and Potomac Railroad, and the disposition made by the U. S. M. R. R'd managers of the proceeds.

You will further oblige me by stating the date on which the Winchester and Potomac Railroad was surrendered by the War Department to its owners.

I am, very respectfully, your obedient servant,

J. W. GARRETT,
President.

DECEMBER 11, 1875.

Mr. JOHN W. GARRETT,
President B. & O. R. R. Co., Baltimore, Md.:

SIR: In reply to your letter of the 2d instant, requesting certain information in relation to a quantity of old rails taken from the Winchester and Potomac Railroad and sold at Alexandria, Va., I have the honor to state that the quantity so taken and sold was $501\frac{1340}{2240}$ tons.

The iron was sold on the 13th day of December, 1865, at public auction, for about $30,340.00; the exact price can not be given, as the iron was sold with other old iron; neither can it be stated just what disposition was made of the proceeds of the sale. The sale was made by General H. L. Robinson, C. Qr. M'r. His accounts show that a portion of the funds were used in paying current expenses of the Mil. R. R. department, and that a portion were transferred to General D. H. Rucker, quartermaster, U. S. A. It is presumed, however, that they were legitimately used.

The Winchester and Potomac Railroad was surrendered to its former owners on the 20th day of January, 1866.

Very respectfully, your obedient servant,

RUFUS INGALLS,
Acting Quartermaster-General, Brevet Major-General, U. S. Army.

X.

On the 11th of May, 1885, the Baltimore and Ohio Railroad Company, as lessees of the claimant company, by its president, made a written application to the Quartermaster-General for the proceeds of the sale of said iron, as follows:

The United States to the Baltimore and Ohio Railroad Company, lessee of the Winchester and Potomac Railroad Company, Dr.

For 507 tons 1,940 pounds (2,240 pounds to the ton) of iron rails appertaining to the Winchester and Potomac Railroad Company, and the property of that company, which once formed a part of the superstructure of that road by the United States authorities, and was subsequently sent to Alexandria, Va., and sold at auction by the United States military railroad department in December, 1865, for the sum of $30,340.

[SEAL.] WM. T. THELIN,
General Auditor Baltimore and Ohio Railroad Company.

November 10, 1885, this application was forwarded to the Secretary of War, and was returned to the Quartermaster-General for report. December 7, 1885, the Quartermaster-General made the following report (omitting what is immaterial), which the Secretary of War approved December 14, as appears thereon:

WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
Washington, December 7, 1885.

To the honorable the SECRETARY OF WAR:

SIR: In compliance with your instructions of November 18, I have the honor to return herewith the communication of the president of the Baltimore and Ohio Railroad Company, dated May 11, 1885, presenting a claim of that company, as lessee of the Winchester and Potomac Railroad, for the value of 507 tons 1,940 pounds iron rails, alleged to have been taken from the latter road and sold at auction by the U. S. military authorities in December, 1865, stated at $30,340.00, and to submit the following report of the result of the consideration of the case in this office:

It is of record that the Winchester and Potomac Railroad was in possession of and operated by the U. S. military authorities at inter-
17 vals between March 24, 1862, and January 20, 1866. The road from Harpers Ferry to Winchester was so operated continuously from March 24 to May 25, 1862, when its operation was interrupted by a Confederate raid and not resumed until June 11, 1862, from which date it was continuously operated until September 3, 1862, when it again fell into the hands of the Confederate forces.

After the battle of Antietam, about September 18 or 19, 1862, the rails were torn up and bridges destroyed from Halltown (6 miles from Harpers Ferry) to Winchester by the Confederate army on its retreat down the Shenandoah Valley. From that time to August, 1864, no organized management or control seems to have been exercised by the United States, except occasionally and irregularly, over the piece of the road not destroyed

between Harpers Ferry and Halltown (6 miles), the territory traversed by the railroad being alternately in the possession of the United States and the Confederate forces during that time.

From August 14, 1864, the United States military railroad department assumed the control and management of the railroad, repaired it, and operated it continuously until January 20, 1866, the date of its relinquishment to the Winchester and Potomac Railroad Company.

In March, 1864, Lt. John R. Meigs, chief engineer, Department of West Virginia, called the attention of the military railroad department to this railroad, with the view of having it repaired and put in running order for military purposes. Copies of his two letters on the subject are inclosed as contemporaneous testimony of the condition of the road at that time.

Gen. D. C. McCallum, director and general manager U. S. military railroads, states in his annual report for year ending June 30, 1866:

"The Winchester and Potomac Railroad was repaired from Harpers Ferry to Halltown, 6 miles, between August 14 and 19, 1864, to Stevenson, 28 miles, between November 2 and 24, and was used to supply the army of General Sheridan, operating in the Valley of Virginia. The iron used in the reconstruction of this line was principally that taken from the Manassas Gap Railroad. The bridges were all rebuilt. The road remained in charge of this department until January 20, 1866, when it was restored to the railroad company."

November 16, 1865, Robt. Y. Conrad, president, addressed the following letter to General McCallum:

"The undersigned, president of the Winchester and Potomac Railroad in Virginia, has the honor to represent: We are informed that a quantity of the iron from our road, flat or strap bar, is now in possession of your department at Alexandria, Va., which we are anxious to recover, as we hope the road is about to be returned to the company.

"We respectfully request that the fact may be inquired into, and, if proper, an order made to return the said iron to my order as president of the company."

This letter was referred to J. J. Moore, general superintendent, etc., "for information as to the quantity of iron now in possession of military railroad department that can be fully identified by the Winchester and Potomac Railroad Company," and was returned November 17, 1865, with the following report:

"We have at this place (Alexandria) $501\frac{1}{2}\frac{9}{2}\frac{4}{4}\frac{0}{0}$ tons of strap rail taken from Winchester and Potomac Railroad."

The records of the military railroad department for this time, which are in excellent condition, have been closely scanned for a reply to Mr. Conrad's letter; none has been found or is noted in the records, and it is assumed that no reply was made.

In December, 1865, and January, 1866, Captain H. L. Robinson, A. Q. M., U. S. military railroads, under orders of the War Department, sold at auction the accumulation of railway rolling stock and material at Alexandria in possession of the Government. The aggregate sum realized by these sales at Alexandria was $2,248,825.41; among them was that of a lot of strap rail, $506\frac{1}{4}$ tons, purchased by J. W. Middleton for $30,657.63 and paid for January 9, 1866. The Winchester and Potomac Railroad iron was, it is believed, included in this sale. The funds realized by these

sales, which were not turned into the Treasury, were used to defray the current expenses of the Quartermaster's Department and the U. S. military railway department. The exact disposition of the actual money received for the lot of iron referred to can not be more precisely stated than that it took one or the other of the courses mentioned.

Reverting to November 16, 1865, the day on which Mr. Conrad applied to General McCallum for the return of the iron to the railroad company, it is remarked that on the same day an autograph note and memorandum was received at this office from Secretary Stanton that Mr. Conrad, in company with Mr. Garrett, had applied to him to have the railroad delivered to the company, and upon this note the Quartermaster-General recommended the transfer of the railroad, which was eventually ordered by the Secretary of War, December 14, 1865.

General McCallum was thereupon directed by the Quartermaster-General, December 15, to turn over the railroad to the Winchester and Potomac Railroad Company, Robt. Y. Conrad, president, and on January 18 12, 1866, General McCallum informed Mr. Moore, the mil'y superintendent, that the railroad company was prepared to receive the transfer of the road at once and had made arrangements with the Baltimore and Ohio Railroad Company to run it for the present. The road was accordingly relinquished to the Winchester and Potomac Railroad Company, January 20, 1866, and has since been extended to Lexington, Va., 162 miles, and operated exclusively by the management of the Baltimore and Ohio Railroad Company under the name of the Harpers Ferry and Valley Branch of that railroad.

In this transfer no mention is made of the iron rails taken from the railroad and sold at auction.

With reference to the matters of fact stated in the claimant's application, which are not touched upon in the foregoing summary, it is remarked:

(1) That the railroad when operated by the Government was used primarily for military purposes to the exclusion of all private traffic which interfered with such use, but transportation for private parties was customary, and when furnished the U. S. military railroad department collected fares and freights according to a schedule of rates imposed for such service.

(2) That the condition of the railroad when turned over to the company was clearly better than it would have been if the United States had permitted it to go to destruction and decay during the war instead of keeping it in use and repair.

(3) That the payment which the Winchester and Potomac Railroad Company was constrained to make for the iron placed in its road by the United States, taken from the tracks of the Orange and Alexandria and the Manassas Gap railroads, is a matter to which the following remarks of Quartermaster-General Meigs, in his annual report for 1865, are pertinent:

"Questions of ownership, claims to material of the road, tracks transferred, either by rebel or by United States authority, from one road to another, are left for decision of the courts; the United States merely retires, leaving the lawful owners to resume their property."

(4) That the only reason which can be given for the failure of the company to secure possession of its old iron is the fact that the company was not in condition to receive it before its sale. If the transfer of the road to the Winchester and Potomac Railroad Company had been authorized

and effected before the sale of the iron it is believed that the company would have been permitted to take possession of it. A denial of this privilege or right would have involved an unjust discrimination by the Government between the treatment of this company and that of all other companies whose roads were used for military purposes during the war and would have been a marked departure from the policy and practice of the Government toward such companies upon the restoration of their roads.

In the accompanying copy of Executive Document No. 155, House of Representatives, 39th Congress, 1st session, may be found on page 485 "a schedule of captured railroad property in the possession of the United States on the 1st day of May, A. D. 1865, in the Department of Virginia, returned to original owners." In this document may also be found statements of such property so returned in other military departments, together with considerable information showing the action taken by the War Department in disposing of railroads and railroad property at the close of the war.

The larger portion of the property listed on page 485 was delivered at Alexandria to the railroad companies named, having been stored in the military railroad depot in that place.

Receipts for the property given by the companies to J. J. Moore, chief engineer and general superintendent military railroads, Department of Virginia, are on file in this office.

The correspondence resulting in the restoration to its former owners of the iron taken from the track of the Seaboard and Roanoke Railroad is inclosed, as showing the action taken by the Department in such cases.

It is considered that these official records verify the allegation of the claimant that "the other Virginia railroad co's whose roads had been restored to their owners and whose reorganization had been effected before the public auction was held at Alexandria at which these rails were sold were freely accorded the privilege of inspecting the property which had accumulated at Alexandria, and were permitted to withdraw such as they could identify and prove to be their own;" that the claims and arguments made upon this fact are sound, and that the claimant is entitled to the relief which the circumstances of the case seem to justify.

But it is not believed to be in the power of the executive department to afford relief at this time without the intervention of Congress.

Under section 5 of the act of Congress approved June 20, 1874 (18 Stat., 110), all balances of appropriations for previous years have been turned into the Treasury and are not available, and under section 4 of the act of June 14, 1878 (20 Stat., 130), and amendatory and supplemental acts, it is made the duty of the accounting officers of the Treasury to examine claims under appropriations, the balances of which have been turned into the Treasury, the amount due each claimant to be reported to Congress by the Secretary of the Treasury.

19 It is, therefore, respectfully recommended, if this report be approved, that this claim, with the papers accompanying it, be referred to the Third Auditor for adjudication by the accounting officers of the Treasury with recommendation for such action as the law and facts of the case require.

In stating this claim the railroad company has fallen into the error of fixing 507 tons 1,940 pounds as the quantity of iron involved; 501 tons

1,940 pounds is the actual quantity. The error was undoubtedly caused by the incorrect copy made by the company of Acting Quartermaster-General Ingalls's letter to Jno. W. Garrett, dated December 11, 1875. A true copy of that letter is herewith.

It also seems that the average price per ton secured for the iron was $60.55, which makes its value $30,387,99, instead of $30,340, as stated in General Ingalls's letter.

Very respectfully, your obedient servant,

S. B. HOLABIRD,
Quartermaster-General U. S. Army.

[1st indorsement.]

84338.] WAR DEPARTMENT,
December 14, 1885.

The within report of the Quartermaster-General is approved, and the accompanying papers in the claim of the Baltimore and Ohio Railroad Company for the proceeds of railroad iron, stated by the company at $30,340, are hereby respectfully referred (through office of the Quartermaster-General) to the Third Auditor of the Treasury for settlement from the appropriation "Transportation of the Army and its supplies," the amount found due to be reported to Congress for appropriation.

WM. C. ENDICOTT,
Secretary of War.

On March 4, 1887, the Third Auditor reported against the claim "without expressing an opinion on the merits of the claim by the Winchester and Potomac Railroad Company, if such a claim should ever be presented."

Thereupon the following proceedings took place before said Auditor:

Re claim of the Winchester and Potomac Railroad Company against the United States, pending before the Hon. John S. Williams, 3d Auditor.

To the Hon. JOHN S. WILLIAMS, *The 3d Auditor:*

Your petitioner, the Winchester and Potomac Railroad Company, being advised that, in the judgment of your department, this claim should have been preferred by the Winchester and Potomac Railroad Company directly, and not through or by the Baltimore and Ohio Railroad Company, its lessee, both pray that it may be substituted as the claimant in interest in the stead of the Baltimore and Ohio Railroad Company, its lessee, claiming on its behalf.

In witness whereof your petitioner doth hereto cause to be affixed its corporate seal and doth cause these presents to be signed by Wm. L. Clark, its acting president, and by Wm. A McCormick, its secretary, this the twelfth day of February, in the year 1887.

[SEAL.] WM. L. CLARK,
Acting Pres't W. and Pot. R. R. Co.
WM. A. MCCORMICK,
Sec'y.

Witnesses as to both:
WM. M. ATKINSON.
DORSEY WALTER.

The Baltimore and Ohio Railroad Company hereby gives its assent to the substitution of the Winchester and Potomac Railroad Company for itself as the petitioner and claimant in this case.

In witness whereof the said Baltimore and Ohio Railroad Company doth hereby cause to be affixed its corporate seal and doth cause these presents to be signed by Robert Garrett, its president, this the 28th day of March, 1887.

[SEAL.] ROBERT GARRETT,
Pres'd't.

Attest: W. H. IJAMS,
Secretary.

20 BALTIMORE, *April 2nd*, 1887.

Col. JNO. S. WILLIAMS,
3rd Auditor:

MY DEAR SIR: I beg to submit herewith the petition of the Winchester and Potomac Railroad Company, praying to be made the party claimant in this case in lieu of the Baltimore and Ohio R. R. Co.

This is done to remove what appears to be an obstacle in your way in arriving at a conclusion, to wit, that the latter co., as lessee of the former, has no right to prosecute and collect this claim.

May I beg for the case your early and, I trust, favorable decision?

Respectfully, yours,

FRANK P. CLARK,
Attorney for the Winchester and Potomac R. R. Co.

April 18, 1887, the Third Auditor again reported upon the claim in the name of the present claimant, recommended its disallowance, and certified the same to the Second Comptroller.

The further action in the Treasury Department appears by the following letters:

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Washington, D. C., March 9th, 1889.

Hon. WILLIAM WINDOM,
Secretary of the Treasury:

SIR: In pursuance of the provisions of section 1063, Revised Statutes, I hereby certify that the claim of the Baltimore and Ohio R. R. Co., as lessees of the Winchester and Potomac R. R. Co., against the United States, now pending in this Department—claim No. 84338—is one that involves disputed facts and controverted questions of law; questions that this office has not the proper means to examine and determine; and that the amount in controversy exceeds three thousand dollars.

I therefore transmit herewith the vouchers, papers, proofs, and documents pertaining to said claim, on file in this office, being thirty-three separate papers, as set forth in the "list" hereto attached, with request and recommendation that the case be transmitted, with all said vouchers, papers, documents, and proofs, to the Court of Claims for trial and adjudication.

Very respectfully,

SIGOURNEY BUTLER,
Comptroller.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 12, 1889.

To the Chief Justice and judges of the Court of Claims:

Under the provisions of section 1063 of the Revised Statutes of the United States I herewith transmit to your honorable court, upon the certificate and recommendation of the Second Comptroller, the claim of the Baltimore and Ohio R. R. Co., as lessees of the Winchester and Potomac R. R. Co., against the United States, with all the vouchers, papers, proofs, and documents pertaining to said claim, for trial and adjudication as provided by law.

The Secretary is in doubt whether the Department has jurisdiction of the claim herewith transmitted, and the question of jurisdiction and authority to transmit the same to your honorable court is therefore submitted with the other questions in the case.

Respectfully, yours,

HUGH S. THOMPSON,
Acting Secretary.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimants are entitled to recover the sum of $30,340.00.

21 IV.—*Opinion of the court.*

RICHARDSON, Ch. J., delivered the opinion of the court:

It is a well-known historical fact that soon after the commencement of the war of the rebellion the Government took control of all the railroads in the seceding States. There was appointed a "director and general manager of military railroads," and the business formed one of the divisions of the Quartermaster-General's Office in the War Department.

The claimants' road, being so situated, was taken actual possession of, repaired, and run by the defendants. In making the repairs there was removed from the road a quantity of scrap iron, and "T" rails taken from the Manas'as Gap Railroad Company were put down in the place of the iron removed, and remained there until the road was surrendered to the claimants in January, 1866. The scrap iron so removed was stored in a warehouse of defendants in Alexandria, Va.

In May and July, 1865, the Quartermaster-General wrote letters to the Secretary of War (set out in Finding IV) advising the following, among other things:

"1st. The United States will, as soon as it can dispense with the military occupation and control of any road of which the Quartermaster's Department is now in charge, turn it over to the parties asking to receive it who may appear to have the best claim and be able to operate it in such manner as to secure the speedy movement of all military stores and troops; the Quartermaster-General, upon the advice of the military commander of the department, to determine when this can be done, subject to the approval of the Secretary of War.

"3d. All materials for permanent way used in the repair and construction of the road, and all damaged material of this class which may be left along its route, having been thrown there during the operation of destruction or repair, to be considered as part of the road and given up with it.

"6th. All rolling stock and material, the property before the war of railroads, and captured by the forces of the United States, to be placed at the disposal of the roads which originally owned it, and to be given up to these roads as soon as it can be spared and they appear by proper agents authorized to receive it."

These letters were indorsed July 23, 1865, by the Secretary of War as follows: "The recommendation of the Quartermaster-General is approved, and he is directed to turn over the roads immediately."

November 16, 1865, the claimant's president made application to the Secretary of War for a return of its road, which application was referred to the Quartermaster-General, who, on the same date, recommended compliance with the request. December 14, 1865, the Secretary of War made this indorsement on the application: "Returned to the Quartermaster-General with directions to turn over the road to the company." (Finding VI.)

There was some delay in carrying out this order, apparently while the claimant's company was making arrangements for operating the road in compliance with the requirements of the War Department, by the first of a series of "principles" or conditions recommended by the Quartermaster-General in his letter of May 13, 1865, and approved by the Secretary of War.

The condition to be complied with by the claimant's company before it became entitled to a return of its road and the iron is set out in the letter of the Secretary of War of August 8, 1865, to General Thomas, commanding the military division of Tennessee, in connection with other roads similarly situated, as follows:

"1. Each and every company will be required to reorganize and elect a board of directors whose loyalty shall be established to your satisfaction." (Finding V.)

The condition was treated by the Secretary of War, December 14, 1865, by said endorsement directing the road to be turned over to the claimant without mentioning the condition, as practically complied with. As there had been some oral communications between him and the
22 president of the company it may be presumed that the negotiations for leasing and operating the road by the Baltimore and Ohio Railroad Company were known to him, and the loyalty of its directors assumed, and that on this account the condition was in effect held to be satisfied. Whatever were the reasons, the same power which made the condition could determine what was a compliance with its provisions, or could waive its performance in any case in accordance with its discretion.

By this order of the Secretary of War the claimant became entitled to the return of its road and to all the benefits of the executive order set out in the findings. The defendants thereafter, either because it was inconvenient to continue the storage of the iron any longer, or because it was so mingled with a large quantity of other iron that there was difficulty in restoring it in kind, proceeded to sell the iron for $30,340.00 and to use the proceeds, received early in January, 1866, for the benefit of the defendants through the War Department.

This brief statement, more fully set out in detail in the findings, shows the claimants to have a meritorious cause of action, and that they are entitled to recover unless their claim is barred by the statute of limitations because the petition was not filed within six years after the cause of action first accrued, according to the provisions of Revised Statutes, section 1069, as interpreted by the Supreme Court with reference to claims transmitted to the court by the heads of Departments under Revised Statutes, section 1063, as was done with this claim by the Secretary of War, March 12, 1889.

In Finn's case (123 U. S. R., 227) the Supreme Court decided that "when the claim is of such a character that it may be allowed and settled by an Executive Department, or may, in the discretion of the head of such Department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the Department for allowance and settlement," substantially as had been previously decided in Lippitt's case (100 U. S. R., 663).

As early as November, 1865, the claimant made application for a return of the iron. Without questioning the claimant's right to the same, but apparently while negotiations were pending with the Baltimore and Ohio Railroad Company for operating the road, the matter was then postponed. The claimant acquired a right to the iron when the Secretary of War directed the road to be turned over to it, December 14, 1865, which carried with it, according to the executive orders, the same right as other roads similarly situated, to "all the rolling stock and material the property before the war, of railroads."

The Baltimore and Ohio Railroad Company, by its president, wrote to the Quartermaster-General on the subject, and received a reply of facts, disclosed, it must be assumed, by the records of his office. Some years after that the same company formally presented a claim to the War Department for the money for which the rails had been sold.

This was referred to the Quartermaster-General, who made a report December 7, 1885, treating the claim as the same presented for the iron in 1865, and as still pending in the Department. He reported that "the claimant is entitled to the relief which the circumstances of the case seem to justify. But it is not believed to be in the power of the Executive Department to afford relief at this time without the intervention of Congress."

23 Upon that report the Secretary of War made the following indorsement:

"The within report of the Quartermaster-General is approved, and the accompanying papers in the claim of the Baltimore and Ohio Railroad Company for the proceeds of railroad iron, stated by the company at $30,340, are hereby respectfully referred (through office of the Quartermaster-General) to the Third Auditor of the Treasury for settlement from the appropriation 'Transportation of the Army and its supplies;' the amount found due to be reported to Congress for appropriation."

It has repeatedly been held that the absence of available money or an appropriation out of which payment could be made by executive officers is no defense in this court to a valid claim against the Government. (Collins' Case, 15 Ct. Cls. R., 35; Shipman's Case, 18 Ct. Cls. R., 147, and other cases.)

We think these proceedings show a sufficient presentation of the claim to the War Department within six years after it occurred, within the principles laid down in the Lippitt and Finn cases. From 1865 down to the time of its allowance by the Secretary of War, in 1885, the same claim was pending in the Department, where all the facts were matter of record. Unlike claims originating outside of the Department and requiring other than record proof of their validity, it did not require that particular demand, either oral or in writing, exacted for the latter claims, so long as the attention of the Department officers was called to it in any informal manner, and it was held under consideration by them.

The Quartermaster-General and the Secretary of War treated the claim as one pending there since the demand of the claimant's president in 1865. (Finding VIII.)

The claim was referred by the Secretary of War to the Third Auditor as one in favor of the Baltimore and Ohio Railroad Company, who were lessees of the claimant and to whom the road was in fact surrendered in 1866 as being able to operate it. Before the auditor an amendment was allowed by consent of all parties substituting the claimant corporation instead of the Baltimore and Ohio Railroad Company, as appears by Finding X. This was right and proper, both because Department proceedings are not subject to rules of pleading and technicalities and because there was a privity between the two companies, and the claim was presented to the War Department by the Baltimore and Ohio Railroad Company, as lessees of the Winchester and Potomac Railroad Company, setting out the fact that the iron was taken from the latter company.

In our opinion the claimants are entitled to judgment for $30,340, and it will be so entered of record.

24 V.—*Judgment of the court entered November* 7, 1892.

THE WINCHESTER AND POTOMAC RAILROAD Company *vs.* THE UNITED STATES.	16603.

At a Court of Claims held in the city of Washington on the 7th day of November, A. D. 1892, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, The Winchester and Potomac Railroad Company, have and recover of and from the United States the sum of thirty thousand three hundred and forty dollars.

BY THE COURT.

25 VI.—*Application of defendants for and allowance of appeal.*

Dec. Term, 1891–1892.

THE WINCHESTER AND POTOMAC RAILROAD Company
vs.
THE UNITED STATES. } No. 16603.

From the judgment rendered in the above-entitled cause on the 7th day of November, 1892, in favor of claimant, the defendants, by their Attorney General, on the 22nd day of November, 1892, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed in open court, November 22, 1892.

WILLIAM A. RICHARDSON,
Chief Justice.

26 In the Court of Claims.

THE WINCHESTER AND POTOMAC RAILROAD Company
vs.
THE UNITED STATES. } No. 16603.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 29th day of November, A. D. 1892.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 15220. Term No. 485. The United States, appellant, vs. The Winchester and Potomac Railroad Company. Court of Claims. Filed December 1, 1892.

FILED.
MAR 20 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT,
v.
THE WINCHESTER AND POTOMAC Railroad Company. } No. 195.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

25 VI.—*Application of defendants for and allowance of appeal.*

Dec. Term, 1891–1892.

THE WINCHESTER AND POTOMAC RAILROAD Company
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In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 29th day of November, A. D. 1892.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT,
v.
THE WINCHESTER AND POTOMAC Railroad Company.
No. 195.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

This is an appeal from the Court of Claims from a judgment for $30,340, in favor of the Winchester and Potomac Railroad Company against the United States for the proceeds of iron taken in 1862 from claimant's road and sold by the Government in 1865.

The claimant, being a corporation, owned a railroad in the State of Virginia, which, in March, 1862, the

military authorities of the United States took possession of and held until January 20, 1866.

The United States removed a quantity of rails from said road and stored them in Alexandria, Va. (R., pp. 5–6.)

At the time said road was taken it was being used and operated by said company for the use of the Confederate States, in pursuance of a written contract between the Confederate States and the president of said company. (R., p. 6.)

In May, 1865, the Quartermaster-General of the United States Army wrote to the Secretary of War letters upon "the question of the disposition of the railroads in the States lately in rebellion." (R., p. 6.)

He proposed a plan for surrendering these roads, which embodied this provision:

> All rolling stock and material, the property before the war of the railroads, and captured by the forces of the United States, to be placed at the disposal of the roads which originally owned it, and to be given up to those roads as soon as it can be spared, and they appear by proper agents authorized to receive it. (R., p. 7.)

This recommendation was approved by the Secretary of War, and it was ordered that the railroads be surrendered on the basis defined by the Quartermaster-General. (R., pp. 8–10.)

On November 16, 1865, the claimant in this case made an oral application "to have its road restored." (R., pp. 10, 12.)

The following application was made:

WASHINGTON, D. C., *November 16, 1865.*

To Brevet Brig. Gen. D. C. MCCALLUM,
Director and Genl. Manager
Mil. R. R'ds, U. S.

SIR: The undersigned, president of the Winchester and Potomac Railroad in Virginia, has the honor to represent: We are informed that a quantity of the iron from our road—flat or strap bar—is now in possession of your department at Alexandria, Va., which we are anxious to recover as we hope the road is about to be returned to the company.

We respectfully request that the fact may be inquired into, and, if proper, an order made to return the said iron to my order as president of the company.

Your ob't servant,

ROBT. Y. CONRAD,
President.

(R., pp. 12, 15.)

To this application "no answer was ever returned, nor were any affidavits or other proof of the ownership or value of the iron mentioned, nor of any of the other facts therein alleged offered to or filed in any executive department of the Government prior to the 11th day of May, 1885." (R., p. 12.)

On December 5, 1865, a written application was made as follows:

To General MEIGS,
Quar. Mas. Gen'l.

SIR: In pursuance of my application, verbally made about the 16th Nov. last, I have the honor, now, to ask your favorable consideration to the wish

of the Winchester and Potomac Railroad Company to have their road (from Harpers Ferry in W. Va. to Winchester, Va.) delivered up to the board of directors of the company, the same being now used as a military road.

Very respectfully,

ROBT. Y. CONRAD,
Pres't W. and P. R. R. Co.

(R., p. 11.)

It was ordered, Dec. 15th, 1895, that the road be turned over to the company. (R., p. 11.)

The claimant company leased its road and other property to the Baltimore and Ohio Railroad Company from the 1st day of January, 1866, which took possession of it on January 16, 1866, and thereafter operated it. (R., p. 12.)

This iron was sold by the Government for the sum of $30,240 in December, 1865, and January 1866. It was paid for January 9, 1866, and the proceeds were used for the benefit of the United States through the War Department. (R., pp. 13–15.)

On December 2, 1875, the Baltimore and Ohio Railroad Company asked information in regard to the sale of this iron and disposition of the proceeds. (R., p. 13.)

On the 11th of May, 1885, the Baltimore and Ohio Railroad Company, as lessees of the claimant company, made a written application to the Quartermaster-General for the proceeds of the sale of said iron, and this application was forwarded to the Secretary of War and was returned to the Quartermaster-General for report. (R., p. 14.)

In 1885 the Quartermaster-General recommended that the claim be referred to the Third Auditor for adjudication by the accounting officers of the Treasury. (R., p. 17.)

This report was approved by the Secretary of War. (R., p. 18.)

It was "referred to the Third Auditor of the Treasury for settlement from the appropriation 'Transportation of the Army and its supplies' the amount found due to be reported to Congress for appropriation." (R., p. 18.)

On March 4, 1887, the Third Auditor reported against the claim "without expressing an opinion on the merits of the claim by the Winchester and Potomac Railroad Company if such a claim should ever be presented." (R., p. 18.)

Thereupon the Winchester and Potomac Railroad Company asked that it be substituted as claimant in interest "in the stead of the Baltimore and Ohio Railroad Company, its lessee, claiming on its behalf." (R., p. 18.)

To this substitution the Baltimore and Ohio Railroad Company assented. (R., p. 19.)

On April 18, 1887, the Third Auditor again reported on the claim in the name of the present claimant, recommending its disallowance, and certifying the same to the Second Comptroller. (R., p. 19.)

On March 12, 1889, the claim was certified, under section 1063, Revised Statutes, by the Secretary of the Treasury to the Court of Claims, with the statement that—

> The Secretary is in doubt whether the Department has jurisdiction of the claim herewith trans-

mitted, and the question of jurisdiction and authority to transmit the same to your honorable court is therefore submitted with the other questions in the case. (R., p. 20.)

SPECIFICATION OF ERRORS.

I.

The Court of Claims had no jurisdiction of this case and its judgment was void.

II.

The court erred in holding that there was an implied contract, and that the United States were bound thereon.

III.

The claim, when instituted in the Court of Claims, was barred, and the court erred in not so adjudging and in not dismissing the claim at cost of petitioner.

IV.

The court erred in rendering judgment in behalf of petitioner upon the facts as found by the court.

POINTS AND ARGUMENT.

I.

The Court of Claims was without jurisdiction.

The reference was made by the Secretary of the Treasury in March, 1889, and the petition was filed in the Court of Claims in June, 1889.

The jurisdiction of the Court of Claims was then governed by the *Bowman Act* (22 Stat., 485), the *Tucker Act of March 3, 1887*, (24 Stat., 505, c. 359), and so much of sections 1059–1068, Revised Statutes, as was not superseded by that act. (*United States* v. *New York*, 160 U. S., 598.)

The proviso to the first section of the act of March 3, 1887, expressly withheld from the court "jurisdiction to hear and determine claims growing out of the late civil war and commonly known as 'war claims.'"

Claimant's railroad was in 1862 operated in hostility to the United States by the Confederate States, under a contract with claimant, and while it was so operated, the road was captured, and the iron in question was appropriated by the Government in March, 1862, and removed from the freehold of claimant to Alexandria and there stored.

The only theory upon which claimant can set up any right to sue the Government is based on the action of the Quartermaster-General and the War Department. The claim is, in all its features, one "growing out of the late civil war."

Before the passage of the act of March 3, 1887, section 1059, Revised Statutes, excepted from the jurisdiction of the court "any claim against the United States growing out of the destruction or appropriation of or damage to property by the Army or Navy engaged in the suppression of the rebellion."

This limitation was made by the *Act of February 18, 1875* (18 Stat., p. 318, c. 80), which was passed to amend section 1059, Revised Statutes, for the purpose of re-

stricting claims for captured or abandoned property under the acts of March 12, 1863, and July 2, 1864.

The *Act of July 4, 1864* (13 Stat., 381), had a similar provision, which was omitted from the Revised Statutes by the compilers, and the act of 1875 was passed to correct this error.

By the *Act of Congress of 1855* (10 Stat., 612), constituting the Court of Claims, jurisdiction was given over all claims against the United States "founded on any law of Congress or upon any regulation of an executive department or upon any contract, express or implied, with the Government of the United States."

The subsequent acts of 1863 and 1864 gave jurisdiction "of all claims for the proceeds of captured or abandoned property."

In *United States* v. *Russell* (13 Wall., 624) the question arose as to the meaning of the limitation upon the jurisdiction contained in the words "appropriation of or damage to property by the Army or Navy."

It was there held that a temporary appropriation of steamboats by military orders, the boats being all the time in command of the owner, was not such an appropriation as took the case out of the jurisdiction of the court, and that such order would sustain a claim upon the theory of an implied contract under the act of 1855. The Russell Case was decided in 1871.

It was the manifest purpose of the act of March 3, 1887, to further limit the jurisdiction of the court, and, therefore, more comprehensive language was used, which expressly withheld from the court "jurisdiction to hear

and determine claims growing out of the late civil war and commonly known as 'war claims.'"

Even without the limitation of the subsequent act, it seems the court would have no jurisdiction in this case under the authority of *Filor* v. *United States* (9 Wall., 46), which was, in effect, a forcible taking, by the Government, against the will of the owner, just as in the case at bar, and differs in this respect from the Russell Case above cited, which was throughout a matter of contract with no purpose on the part of the officers to appropriate the steamers. There was a clear purpose in the case at bar to appropriate the roads and the iron. There was nothing in the acts attending the appropriation upon which an implied promise could be founded. (See also *Pugh* v. *United States*, 13 Wall., 633.)

If the right of action grows out of the taking of the property and its conversion, it is certainly a war claim, and the jurisdiction of the court is excluded.

If the court could not take original jurisdiction of the claim for the reasons stated, the fact of its being referred to the court by the Secretary of the Treasury would not enlarge the jurisdiction. By the proviso to section 1063, Revised Statutes, no case shall be referred by any head of a department, unless it be of such a character that the Court of Claims might take jurisdiction of it upon the voluntary action of the claimant. (*United States* v. *New York*, 160 U. S., 615.)

II.

There was no implied contract.

The iron having become, when taken under the circumstances, *ipso facto* the property of the United States,

the claimant could not set up a right to the proceeds of the sale, nor would there be anything to sustain an implied promise upon the part of the officers of the Government to pay for the iron or account for its proceeds.

The findings show that this property was "employed in actual hostilities on land."

Under the authority of *United States* v. *Klein* (13 Wall., 136) and *Young* v. *United States* (97 U. S., 60), it became, when taken, the property of the United States. If this be true, then no action of the Quartermaster-General or of the War Department could create such an obligation to return the iron that duty to pay for it would arise upon failure to return it.

An implied promise must arise out of the circumstances under which the property was taken. If it did not arise then, and the taking made it the property of the United States, no subsequent action of any executive department could create a state of affairs under which an implied promise could arise. The property having become that of the United States, no executive officer had the right to dispose of it or to do any act which would create in it any equities or rights in the former owner. There being no implied promise arising out of the fact of taking, and this taking having vested ownership in the United States, there could be no consideration moving toward the United States out of which an implied promise could arise. The orders of the Quartermaster-General and the scheme upon which the railroad properties were to be restored were, so far as the rights of the United States are concerned, a mere volun-

tary surrender, and if, under this plan, the United States failed to surrender any material which it had taken from a road which was operated under contract with the Confederate Government and in hostility to the United States, such withholding would not be a new taking out of which an implied promise could arise.

III.

The claim was barred by the statute of limitations.

By section 10 of the act of March 3, 1863, amendatory of the act of February 24, 1855, establishing the Court of Claims—

> Every claim against the United States cognizable by the Court of Claims shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this (that) act within six years after the claim first accrues, etc. (*United States* v. *Lippitt*, 100 U. S., 665.)

To same effect is section 2, Tucker Act.

The petition in this case was filed on the 24th day of June, 1889, and, therefore, the claim was barred, unless it was saved by the fact that it had been pending before an executive department.

> Limitation is not pleadable in the Court of Claims against a claim cognizable therein and which has been referred by the head of an executive department for its judicial determination, provided said claim was presented for settlement at the proper department within six years after the claim accrued. (*United States* v. *Lippitt*, 100 U. S., 668.)

The claim, if not presented to an executive department before six years have expired after it accrued, is barred, even though it thereafter be referred by an executive department to the Court of Claims and was originally cognizable therein. (*Finn* v. *United States*, 123 U. S., 231; *De Arnaud* v. *United States*, 151 U. S., 483.)

It must be borne in mind that the theory of the case is not that the taking was such as to raise an implied promise upon the part of the Government to pay, but that the sale of the iron in 1865 and the use of the money after the orders establishing the plan for restoring the possession of railroads was adopted, was such action upon the part of the Government as raised an implied promise. Assuming that the orders of the War Department and the application for restoration of claimant's road constituted such an agreement as established a right to the iron in claimant, a sale of the iron thereafter was a conversion by the Government, and if the claimant elected not to follow the iron in the hands of the purchaser after such conversion, but to look to the Government for the money, its right then was for the payment of the money and this constituted its claim.

There never was any demand made upon any department of the Government, nor any proceeding instituted to recover this money within six years after the conversion.

On November 16, 1865, Mr. Conrad, president of the Winchester and Potomac Railroad Company, applied "to have that road transferred to him on the same terms on which other railroads have been transferred." (R., p. 10.) This was no application for the iron and was in no sense

a claim lodged with any executive department for the iron in question. At that time on no theory could he have made any such claim. If any right to make a claim accrued it was after that time and after the road was ordered to be turned over, which was December 15, 1865. (R., p. 16.)

On December 5, 1865, Mr. Conrad, in pursuance of his former application, verbally asked to have claimant's road delivered up to the board of directors.

This was not the filing of any claim which a department could have allowed.

In 1866 claimant leased its road to the Baltimore and Ohio Railroad Company. It was not in possession of this iron and therefore could not deliver it and the lessee company did not become a bailee of it. It, by the lease, acquired no ownership of it, and did not acquire such rights as bailee under the lease as gave it a right to maintain an action for its possession or conversion.

On November 16, 1865, Mr. Conrad, claimant's president, addressed a letter of inquiry in regard to the iron, with a request "that the fact may be inquired into, and, if proper, an order made to return the said iron to my order as president of the company." (R., p. 12.)

This was not the lodgment of a claim against the Government in any sense, and this communication shows that the application made on November 16, 1865, for the possession of the road was not intended as a claim for this iron, for, being of the same date, it simply makes inquiry in regard to it. As above shown no order had then been made to turn over the road, and the claimant company

then had no right to make any claim of any character. Nothing further was done in the way of filing a claim of any character until the 11th day of May, 1885. (R., p. 12.)

It is insisted, then, that no claim for this iron, and especially that no claim for the money which arose from the conversion of the iron, was made until more than nineteen years after the sale and conversion. At that time the Baltimore and Ohio Railroad Company made an application in its own name to the Quartermaster-General for the proceeds of the sale of said iron. This application was pending in the War Department until 1887, when it was reported on adversely, and then the present claimant was substituted as the party in interest in the petition. If the claim be not a war claim, and if a right arose to the money, then, being a money claim, it should have been filed with the Secretary of the Treasury and not in the War Department. Not having been filed in the proper Department, the running of the statute was not suspended. (*United States* v. *Lippitt*, 100 U. S., 665.)

J. M. DICKINSON,
Assistant Attorney-General.

MAR 24 1896

No. 195

IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, APPELLANT,

vs.

THE WINCHESTER AND POTOMAC RAILROAD COMPANY, APPELLEE.

Appeal from the Court of Claims.

APPELLEE'S BRIEF.

FRANK P. CLARK,

Attorney for the Winchester and Potomac Railroad Company, Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, APPELLANT,

vs.

THE WINCHESTER AND POTOMAC RAILROAD COMPANY, APPELLEE.

Appeal from the Court of Claims.

APPELLEE'S BRIEF.

The appellee, a body corporate, owns a line of railway thirty-two miles in length, running from Harper's Ferry, in West Virginia, to Winchester, Virginia, twenty-two miles of which lies in West Virginia, and owned it for many years prior to the late civil war. (Finding, 1.)

When the war broke out, the territory in which this road lies was within the lines occupied by the army of the Confederate States, and it, as was the case with all railroads in the South, was operated by or under the direction of the Confederate authorities. Early in 1862 the United States' forces took possession of the lower Valley of Virginia, or Shenandoah Valley, as it is often called, and of this road, and held and used it for military purposes for the remainder of the war, except for brief intervals. To fit it for their purposes, the federal authorities relaid it with a "T" rail, taken from the road bed of the Manasses Gap Railroad, and cast the old strap rail, that was taken from the track, along the side of the road.

After awhile these old discarded rails were removed, and stored in a government warehouse in Alexandria, Virginia.

The United States' military authorities continued in possession and enjoyment of this road until the end of the war.

When the war ended most of the railroads in the Southern States were being operated by the military railroad department at a great expense. Says the Quarter-Master-General, writing to the Secretary of War on July 17, 1865, (Record, page 7): "* * it will be perceived * * * that these "rail-roads have been costing, during the present year, upwards "of $1,300,000, *monthly*, and the expenditures are still going "on; these expenditures were necessary during the war, but it "appears to me that the Government should be relieved from this heavy expenditure by the restoration of the rail-roads to "the Companies, and I recommend that this be done as soon "as it is possible to make arrangements for the transfer, *on the "basis of my report of 19th May last.*"

The "*basis*" here referred to appears in the letter from the Quarter-Master-General to the Secretary of War, (Record, pages 6, 7,) and on this "basis," as we shall see, the return of this road was accepted.

This "*basis*" was as follows:

"1. The United States will * * * turn it" (i. e. the railroad) "over to the parties * * * who may appear to have "the best claim *and be able to operate it in such manner as to "secure the speedy movement of all military stores and troops.*"

"2. No charge to be made against the railroad for expense "of material or expense of operation."

(NOTE. "Expense of material" evidently means such as the military authorities had put into the road. What the "expense of operation" means is not quite clear, as the military authorities never "accounted to the claimant for the revenues of the road," (Finding 2); and the government surely could have had no claim against the company for using its road and appropriating all the revenues derived therefrom).

"3. All materials * * * left along its route * * * "to be considered as part of the road and given up with it."

"4. No payment or credit to be given to the railroad for its "occupation or use by the United States during the continu- "ance of the military necessity which compelled the United "States to take possession of it by capture from the public "enemy. The recovery of the road from the public enemy "and its return to loyal owners, and the vast expenditure of "defense and repair, are full equivalent, and more than an "equivalent for its use."

("The capital stock of the company was largely owned by "citizens of loyal States.") (Finding 1.)

"5. All movable property * * * of the United States "to be sold at public auction, after full public notice, to the "highest bidder."

"6. *All rolling stock and material, the property before the war of "railroads, * * * to be placed at the disposal of the roads "which originally owned it, and to be given up to these roads as "soon as it can be spared, and they appear by proper agents author- "ized to receive it.*"

Such were the terms and conditions upon which railroads in the Southern States were to be surrendered to their owners, and they were adopted and promulgated as early as the 26th of July, 1865, as the endorsement on the last letter from the Quarter-Master-General to the Secretary of War, bears that date. That endorsement is as follows:

"The recommendation of the Quarter-Master-General is "approved, and he is directed to turn over the roads *immedi- "ately.*

"By order of the Secretary of War,

"THOMAS T. ECKERT,

"Acting Assistant-Secretary of War.

"War Department, July 26, 1865." (Finding 4.)

Then follow (Finding 5) two executive orders, dated August 8 and October 14, 1865, which are applicable solely, the first, "to all railroads in the State of Tennessee and their continua- "tions in adjoining States," and the second, "to all railroads 'within the limits of your" (*i. e.*, Major-General George H. Thomas's) "command *desiring to purchase railroad rolling stock*

"*and material from the United States* for the purpose of repairing "the losses of the war," the condition of purchase in the letter of May 19, 1865, having been "that it should be sold at auc- "tion, after public notice, to the highest bidder;" and the condition of purchase in the last executive order being that it be sold directly to the railroads upon "satisfactory bonds, in "the form herewith enclosed, binding them to the payment to "the United States of the full appraised value," etc., etc.

Such, then, were the rules established by the Secretary of War touching the turning over of the railroads in the South to the companies.

On the 16th of November, 1865, the appellee, through its President, Robert Y. Conrad, Esq., made oral application for the surrender of its road; this application was made *directly* to the Secretary of War.

The form of this application appears in the letter from the Hon. Edwin M. Stanton, Secretary of War, to the Quarter-Master-General, dated November 16, 1865, (Finding, 6,) and was as follows:

"Mr. Conrad, president of the Winchester and Potomac "Railroad Company, applies to have that road transferred to "him, *on the same terms on which other railroads have been trans- 'ferred*" (italics mine).

* * * * * * * *

"The matter is referred to you for such arrangement and 'recommendation as you deem proper on the facts of the "case."

The Quarter-Master-General "recommends": "That as the "president of the road now comes forward * * and applies "to have the road transferred to him, that this be done, *and* "that * * the Company shall be admitted to the privileges "of the executive order of 14th of October last, as has beeu "done in the case of the Wilmington and Weldon Railroad of "North Carolina."

On this recommendation, the Secretary of War directed the road to be turned over to the company.

Can there be any doubt that when Mr. Conrad, who was accompanied by Mr. Garrett, the president of the Baltimore and Ohio Railroad Company, (Record, page 16,) made this oral application to the Secretary of War for the return of the road, that the conditions on which it was to be turned over, as embodied in the two departmental and the two executive orders above referred to were fully explained and made known to him?

And why did Mr. Garrett accompany Mr. Conrad? Was it not to satisfy the Secretary of War and the Quarter-Master-General, that the Winchester and Potomac Company had fully complied with all the conditions imposed by the Government?

If any doubt remains, see the letter from Mr. Conrad to Gen'l McCallum. (Finding, 8.) Evidently, at the interview with the Secretary of War, Mr. Conrad was instructed, should he find any "rolling stock and material, the property before "the war" of his road, that he must apply for its return to the proper officer, who was "Brevet Brig. Gen'l, D. C. McCal-"lum, Director and General Manager Military Railroads, U. S."; hence this letter, written, as it will be observed, *on the same day* that the oral application was made to the Secretary of War. This is the letter:

"WASHINGTON, D. C., Nov. 16, 1865.

"*To Brevet Brig. Genl. D. C. McCallum,*
"*Director and Genl. Manager Mil. R. Rds, U. S.*

"SIR: The undersigned, President of the Winchester and "Potomac Railroad in Virginia, has the honor to represent: "We are informed that a quantity of the iron from our road— "flat or strap bar—is now in possession of your department at "Alexandria, Va., which we are anxious to recover, as we "hope the road is about to be returned to the company. We "respectfully request that the fact be inquired into, and, if "proper, that an order be made to return the said iron to my "order as president of the company.

"Your ob't servant,
"ROBERT Y. CONRAD,
"President."

"At or about the time this letter * * * was written, "he (Mr. Conrad) made an oral application to the Quarter-"Master-General" for the iron. (Foot of page 12 Record.) "To this application no answer was ever returned." (Finding 8.) But "the iron was sold for the sum of $30,240, and paid "for January 9, 1866, and the proceeds were used for the "benefit of the United States, through the War Department." (Same finding.)

That the conditions contained in the letter of May 19, 1865, were made known to Mr. Conrad, and became the terms on which the road was accepted by him, is made perfectly clear when we consider the application of the Orange and Alexandria Railroad (a Virginia road), referred to in that letter (first paragraph), in connection with the statement of the Quarter-Master-General, on page 17 of the Record, where he says, that as to the property of the Virginia roads they "were permitted to withdraw such as they could identify and "prove to be their own." This, moreover, links the Manassas Company with the transaction. How, will appear more clearly as we proceed.

If it be important to find a reason for the failure of the Military Railroad Department to surrender this iron, the explanation offered by the Quarter-Master-General, in his letter to the Secretary of War, dated December 7, 1885, is doubtless the true one. He says, (page 16, Record, foot of page,) "the only reason which can be given for the failure of the "Company to secure possession of its old iron is the fact that "the Company was not in condition to receive it before its "sale. If the transfer of the road to the Winchester and "Potomac Railroad Company had been authorized and effected "before the sale of the iron, it is believed that the Company "would have been permitted to take possession of it. A "denial of this privilege or *right* would have involved an "unjust discrimination by the Government *between the treatment* "*of this Company and that of all other companies* whose roads were "used for military purposes during the war, and would have

"been a marked departure from the policy and practice of the "Government toward such companies upon the restoration of "their roads."

* * * * * * * *

"The larger portion of the property * * was delivered "at Alexandria to the railroad companies named, having been "stored in the military depot in that place."

"Receipts for the property given by the companies to J. J. "Moore, Chief Engineer and General Superintendent Military "Railroad Department of Virginia, *are on file in this office.*

"It is considered that these official records verify the allega- "tion of the claimant, that the other Virginia railroad com- "panies, whose roads had been restored to their owners and "whose reorganization had been effected before the public auc- "tion was held at Alexandria, at which these rails were sold, "were accorded the privilege of inspecting the property which "had accumulated at Alexandria, and were permitted to with- "draw such as they could identify and prove to be their own; "that the claims and arguments made upon this fact are "sound, and that the claimant is entitled to the relief which "the circumstances of the case justify." (Italics mine.)

Another explanatory fact is this. The Winchester and Potomac Company had to qualify itself "to operate its road "in such manner" as the departmental order of May 19, 1865, prescribed (Record, page 6), by effecting a lease of its road to the Baltimore and Ohio Railroad Company, and negotiations to that end were in progress at the very time that this sale took place. The lease went into effect January 1st, and the road was turned over January 16th (Record, page 12) and the sale was about this time (Record, page 18.)

After January 1st, the President of the Company doubtless practically surrendered the management of its affairs to the Baltimore and Ohio Company, and on the 16th unquestionably did.

Between the date of submitting the petition for the surrender of this iron, Nov. 16, 1865, to December 2, 1875, the claim was not actively pressed.

On the latter date vigorous prosecution of it began and has been persistently urged up to the present moment.

The following explains why its prosecution was not actively pressed between November 16, 1865, and December 2, 1875:

"Immediately upon the restoration of the roads to their "respective companies, the Manassas Company made demands "upon the Winchester and Potomac Company for the iron so "laid upon its road, or for its value, and its demand not being "complied with, it brought suit and obtained a judgment for "the value thereof, which judgment was, in 1873 or 1874, "settled by a compromise, the Winchester and Potomac Com- "pany paying the Manassas Company the sum of $25,000." (Finding 2.)

When we consider that the active prosecution of this claim was resumed on December 2, 1875, I think we may infer that the Manassas Company protested to the United States authorities against the payment of the proceeds of the sale of this iron to the Winchester and Potomac Company, so long as its claim for the iron which had been taken by the Government from its (the Manassas) road, and placed upon the Winchester and Potomac road remained unsettled, and this appears clearly from the letter from the Quarter-Master-General to the Secretary of War, dated December 7, 1885, and bearing this endorsement of the Secretary of War (page 18, Record): "The within report of the Quarter-Master-General is ap- "proved." Says the Quarter-Master-General, in this letter: "The payment which the Winchester and Potomac Railroad "Company was constrained to make for the iron placed in its "road by the Manassas Gap Railroad, is a matter to which the "following remarks of Quarter-Master-General Meigs, in his "annual report of 1865," (note the date,) "are pertinent."

"Questions of ownership, *claims to material* * * tracks "transferred, either by rebel or by United States authority, "from one road to another, are left for decision of the Courts; "the United States merely retires, leaving the lawful owners "to resume their property." (Record, page 16.)

Note in this connection the following paragraph from this same letter, (Record, page 16):

"Reverting to November 16, 1865, the day on which Mr. "Conrad applied to Gen'l McCallum for the return of the iron "to the railroad company, it is remarked that on the same day "an autograph note and memorandum was received at this "office from Secretary Stanton that Mr. Conrad, *in company* "*with Mr. Garrett*, had applied to him to have the railroad "delivered to the Company, and upon this note the Quarter-"Master-General recommended the transfer of the railroad, "which was eventually ordered by the Secretary of War, "December 14, 1865."

Note also that "the iron taken from the track" of the Roanoke and Seaboard Railroad, a Virginia and North Carolina road, was returned to that road. (Record, page 17.)

THE CONDITIONS OFFERED BY THE GOVERNMENT AND ACCEPTED BY THIS COMPANY, THEN, WERE AS FOLLOWS:

1. The Company must be "able to operate its road in such "manner as to secure the speedy movement of all military "stores and troops."

2. It must surrender all claim to "payment or credit, for "the occupation or use by the United States" of its road.

These conditions involved the expenditure of money, the assumption of grave liabilities and the surrender of claims which the Company held against the Government.

By the first condition it was required to qualify itself to operate its road. This was no small undertaking; this Company was a mere legal entity; it owned absolutely nothing but its franchise; it had no rolling stock, no equipment and no means with which to purchase either.

Therefore it was compelled, as we have seen above, in order to comply with this condition, to effect a lease of its road to the Baltimore and Ohio Railroad Company. (Finding 7.) And this explains why the Baltimore and Ohio Company for awhile prosecuted this claim.

The second condition involved the surrender by the Company of all claim against the Government for the use of its road.

Whatever views may have been entertained at this time as to the liability of the Government to its stockholders in the States in revolt, little doubt was then entertained as to its liability to loyal stockholders, citizens of and living in loyal States, who held "a large portion of the stock" of the appellee. (Record, Finding 1.)

Therefore *some liability* existed, or it was supposed existed, and the cancelling of this liability was the second condition of the agreement.

The Government on its part was:

1st. To release "all charges against the railroad for expense "of material or expense of operation."

2d. To give up "all material used in the repair of the road, "etc.," and

3d. *To surrender "all rolling stock and material, the property "before the war of the road and captured by the forces of the "United States."*

Can there be any question that the tender and acceptance of and the compliance with these conditions established a contract between this Company and the Government? The lower Court so found, and in the syllabus appears a summing up of the findings of fact and the conclusions of law:

Winch. & Pot. R. R. Co. vs. U. S., 27 Ct. of Cl., 494.

Syllabus:

"At the close of the civil war, the War Department offers "to return railroads in the South to the owners on certain con- "ditions, subject to the approval of the secretary, *all rolling "stock and material to be given up to these roads.* The claimant "complies with the conditions and the road is accordingly "turned over. Some material belonging to it is not turned "over, but sold. The claimant's president applies for the "return of the material before sale by a personal application "to the Secretary of War. Subsequently, a formal claim for "the money is filed."

1. "The offer of the War Department in 1865, to turn "over the Southern railroads to their owners, with 'all rolling "'stock and material' when complied with and carried into "effect, must be regarded as a contract."

2. "Where material belonging to a road "was casually sold "after the road had been turned over to the company, an "action will lie to recover the money."

Is not the conclusion thus reached by the Court of Claims justified by the numerous decisions of this Court touching the question of the liability of the United States upon its contracts with individuals and corporations?

The authorities hereinafter cited, it is respectfully submitted, establish beyond controversy this proposition, to wit: that whenever the United States, through any one of its executive officers, enters into a contract not prohibited by law, quoad such contract, it relinquishes its sovereign rights and subjects itself to the rules governing Courts in the construction and enforcement of such a contract just as though it were a contract between man and man, and this, whether it be an express contract or one implied from the facts of the particular case. This being true, what doubt can there be that the facts of this case establish such a contract?

Let us glance at the range of these authorities.

U. S. vs. Speed, 6 Wall. 77.

"The Commissary-General, may approve a contract by "letter."

See also—Clark vs. U. S., 543.

U. S. vs. Speed, 8 Wall. 77.

Where a contract requires an expenditure by the contractor, the United States must do whatever is necessary to enable such contractor to comply with the contract.

In the case at bar, the appellee, in order to carry out its undertaking, was compelled, as we have seen, to affect a lease of its road to the Baltimore and Ohio Railroad Company.

See also—Gibbons vs. U. S., 8 Wall. 269.

U. S. vs. Smoot, 15 Wall. 36.

The same construction and effect must be applied to contracts made by the United States, as to those between individuals.

Salomon's Case, Ct. of Cl., Vol. 7, page 483, (affirmed, 19th Wallace, page 17.)

In this case the Court held the following language: "In *no* "instance, to my knowledge, have we declined to give judg- "ment for the claimant, when on grounds of *quantum meruit* "he has shown himself clearly entitled to recover."

See also—Amoskeag Mfg. Co. vs. U. S., 17 Wall. 592.
U. S. vs. Gill, 20 Wall. 517.
U. S. vs. Smith, 94 U. S. 214.

U. S. vs. Bostwich, 94 U. S. 53.

The correspondence under which the United States enters into an occupancy constitutes a contract of letting, and the United States can be held liable for damages for misuse of the leased premises.

Clark vs. U. S., 95 U. S. 539.

The *Act of June 2, 1862*, requires all contracts made by the Secretary of War, Secretary of Navy and Secretary of the Interior, to be reduced to writing, etc., etc.

Nevertheless, * * a parol contract, wholly or partially executed, entitles the party to recover "the fair value of his "property or services, as upon an implied contract for the '*quantum meruit*.' "

Knote vs. U. S., 95 U. S. 149.

To constitute an implied contract with the United States for the payment of money on which an action will lie in the Court of Claims, there must have been *some consideration moving to the United States*, or they must have *received the money* charged with a duty to pay it over, or the claimant must have had a lawful right to it when received, as in the case of money paid by mistake.

Are not all of these conditions fulfilled in this case?

U. S. vs. State Bank, 96 U. S. 30.

The United States cannot, as against an innocent party, hold his money which has gone into its treasury by fraud of its agent.

In this case the Supreme Court used the following language:

"Surely it ought to require neither argument nor authority "to support the proposition that when the money or property "of an innocent person has gone into the coffers of the nation "* * * such money or property cannot be held against "the claim of the wronged and injured party."

See also—Dist. St. Bk. vs. U. S., 114 U. S. 401.

Parish vs. U. S., 100 U. S. 500.

Where parties in the effort to fulfil an order for a large amount of ice for the use of the Government, which by their contract they were bound to furnish, purchased ice, which was lost by the suspension of the order, they are entitled to recover the cost of the ice so lost, and the expense of the care and attempt to preserve it.

See also Western Union R. R. Co. vs. U. S., 101 U. S. 543
U. S. vs. Peck, 102 U. S. 64.

The United States is liable in damages for a breach of contract, on the same principle and to the same extent as a private party; and a suitable remedy has been provided by law in the jurisdiction conferred upon the Court of Claims.

The government cannot retain the obligation of a contract against a company, and at the same time vary its own.

See also Chicago, etc., R. R. Co. vs. U. S., 104 U. S. 680.

Harvey vs. U. S., 105 U. S. 671.

"A written bid, * * and acceptance of that bid, constitute "a contract between the parties," which can be enforced.

See also Garfield vs. U. S., 93 U. S. 242.
Swift vs. U. S., 111 U. S., page 22.
U. S. vs. Great Falls Mfg. Co., 112 U. S. 645.
U. S. vs. Mueller, 113 U. S. 153.

In the light of these authorities surely the liability of the Government to the Winchester and Potomac Railroad Company for the amount realized from the sale of this iron is established. That amount is $30,340. (Record, page 23.)

If, then, the contract, its breach, and the amount of damages sustained, are established, there remain but two questions to be considered, and they are:

1. DID THE APPELLEE MAKE A DEMAND FOR THE IRON IN CONTROVERSY, AND WAS THAT DEMAND SUFFICIENT IN FORM AND SUBSTANCE?

There were several demands:

(*a*). An oral demand on the 16th November, 1865, made upon the Quarter-Master-General. (Record, page 10.)

(*b*). Another demand upon the same on the 5th of December, 1865. (Record, page 11.)

(*c*). And a formal written demand for the iron specifically, by the letter addressed to General McCallum, General Manager Mil. Railroads. (Record, page 12.)

In considering this point it must be remembered that a demand or request for the road was a demand for all that the executive order of May 19, 1865, embraced, and it included, in its 6th clause, this iron.

Were these demands sufficient in form and substance? It is respectfully submitted that they were.

These several applications are *petitions* to the Quarter-Master's Department.

In the Lippett Case, 100 U. S. page 663, this Court used this language:

"The limitation, etc., does not bar * * a claim, * * "provided it was *presented* for settlement at the proper depart- "ment within six years after it first accrued."

"The filing of the petition should *relate* back to the date "when it was first *presented* at the department for allowance "and settlement." In the Finn Case, (123 U. S, 227,) substantially the same term is used, viz: "*Presented.*"

The claim in the case at bar was surely duly "presented" and in a form sufficiently intelligible.

See also—Taylor's Case, 14 Ct. of Cl. page 339.

In the Green Case, 18 Court of Claims Rep. page 96, the agreement was a *verbal* one between a certain James Green, the owner, and C. B. Ferguson, 2nd Lt., and A. A. Q. M. The application for payment was as follows, (page 97): "about "the time the first monthly rent became due, the owner *applied* "to Lieut. Ferguson for the same, * * * subsequently he "*applied* for the rent to the Qr. Mr. Gen'l through his brother." * * *Payment was formally refused* (pages 97 and 98,) by a letter from the Qr. Mr. Gen'l, because of the disloyalty of the applicant. This was in 1864, and not until May 3, 1872, (page 99,) did the applicant make his demand *in writing*, and that by letter, no more formal than was the letter in this case.

It would seem, then, that the adjudicated cases sustain the Court of Claims in its ruling in this case. (Record, page 23.)

See also—

Warder vs. U. S., 25 Ct. of Cl., 177 and 178.

2. IF THE PRESENTATION OF THE CLAIM WAS SUFFICIENT IN FORM AND SUBSTANCE, IS IT BARRED BY LIMITATIONS?

We rest this point upon the opinion of the Court below, respectfully referring the Court to the additional authority of the—

DeArnand Case, 151 U. S. 495,

and to the following further considerations.

It is quite clear, from the authorities, that after the claim is *presented* at the proper department, the claimant has nothing more to do but to await the department's decision, and the statute is in suspense until that decision is rendered, and only from the time when the department announces its refusal does the statute begin to run.

This case on this point, bears a strong analogy to the Taylor case reported in 14 Ct. of Cl. On page 353 of that case, Justice Davis says:

If the owner "cannot come here before the Secretary of the "Treasury has heard him, and decided against him, then his "cause of action accrued on the refusal of the Secretary of the "Treasury."

To apply this doctrine to this case; we "presented our claim to the proper department" in 1865. We could not "come here," *i. e.*, to the Court of Claims, until the Quarter-Master-General refused it; this he never did; *on the contrary he approved it*, and sent it to the Treasury Department for settlement, and not until the third auditor disallowed it, was there ever any answer from the Government; but that answer when given was no refusal, it was merely a reference to the second Comptroller with an adverse report, and the second Comptroller referred it to the Honorable the Secretary of the Treasury, and by him it was transmitted, under Section 1063 of the Revised Statutes, to the Court of Claims.

Respectfully submitted,

FRANK P. CLARK,

Attorney for the Winchester and
Potomac Railroad Company, Appellee.

REPLY TO APPELLANT'S BRIEF.

STATEMENT.

The "statement of the case" made by the appellant in this brief is too concise to give a complete understanding of the facts, and to that end the Court is respectfully asked to read the statement in this brief in connection therewith.

SPECIFICATIONS OF ERRORS ASSIGNED BY THE APPELLANT.

1. "THE COURT OF CLAIMS HAD NO JURISDICTION OF THIS CASE."

Say the applellants: "The jurisdiction of the Court of Claims was * * governed by the Bowman Act * * the Tucker Act * * and so much of Sections 1059 to 1068, Revised Statutes, as were not superseded by that Act." And they refer to the case of U. S. vs. N. Y., 160 U. S. 598, recently decided.

As I read this decision I find that this Court holds that Revised Statute 1063 is not repealed by the Bowman Act, nor by the Tucker Act, but on the contrary, that that statute and these two Acts "stand together * * as parts of one general system * * without conflict in any essential particular."

And the Court goes further and uses the following language:

"There might be claims in the hands of an auditor or of the Comptroller of the Treasury for examination, which, in the first instance, were to be passed on by some other department than that of the Treasury," and in that event "*claims of that special class* could not be transmitted by the Secretary of the Treasury to the Court of Claims under Section 1063, Revised Statutes, for adjudication, *except* 'upon the certificate of the auditor or Comptroller of the Treasury' having it under examination." (Page 607.)

Therefore, if this had been a claim which should have, but had not, been passed on by the Quarter-Master's Department,

but which had been transmitted "upon the certificate of the * * Comptroller of the Treasury," then, even, the Court of Claims would have had jurisdiction. But it has been "passed on," and *favorably*, by both the Quarter-Master-General and the Secretary of War, and by the latter "referred (through the Quarter-Master-General) to the third auditor of the Treasury for settlement" (Finding 10, page 18 Record), and by the Secretary of the Treasury it has been transmitted to the Court of Claims under Revised Statute 1063.

Being, then, so meritorious a claim, and one founded on facts which establish an implied, if not an express, contract, does it not meet the requirements of Revised Statute 1063, as interpreted by this Court in the case referred to by the appellants?

Again, the whole argument of the appellant is based upon the assumption that this claim is a "war claim."

It is nothing of the kind; it is a claim founded upon a contract, and one entered into after the war had ended.

I venture the proposition that were the United States to *make a contract*, express or implied, with an enemy in arms, the Court of Claims would have jurisdiction of a case instituted to recover damages for its breach.

In the Sinking Fund cases, 99 U. S. 719, this Court, speaking through its late lamented Chief Justice, have said: "The United States are as much bound by its contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen."

Can there be any question, as between individuals, that the same state of facts as have been certified up to this Court in this case would be held by any court to constitute a contract for the breach of which either party thereto would be entitled to damages, and that the amount of damages would be the value of the iron?

2. "THE COURT ERRED IN HOLDING THAT THERE WAS AN IMPLIED CONTRACT."

The reasoning to support this proposition, it is respectfully submitted, is founded on the same erroneous view of the case that characterizes the foregoing.

Say the appellants (Brief, page 10): "*An implied promise must arise out of the circumstances under which the property was taken.*"

What can this mean? The "circumstances under which the property was taken" certainly raised no promise to return it. The captors could hardly have had any such humane purpose as that. Again, say the appellants, "there being no implied promise arising out of the fact of taking, and this taking having vested ownership in the United States, there *could* be no consideration moving toward the United States out of which an implied promise could arise."

Why not? Was there anything in the fact of taking except the taking, and could not the government do with the property whatever, in the judgment of the Executive Department having control of it, might appear best for its interests? Could not the Quartermaster's Department sell it? Did it not sell it and did it not give a good title to the purchaser? If it could sell it, could it not use it in making payment for transportation of troops and munitions of war? And, indeed, is not this precisely what it did?

3. "THE CLAIM, WHEN INSTITUTED IN THE COURT OF CLAIMS, WAS BARRED."

On this point, say the appellants, "it must be borne in mind that the theory of the case is not that the taking was such as to raise an implied promise * * but that the sale of the iron * * and the use of the money * * was such action * * as raised an implied promise."

Here again appears this same misapprehension of the real issues involved. The promise does not grow out of the taking nor of the sale; it is specifically made in the executive orders.

Say the Government to the railroad company: If you will render certain services you shall be paid for them, and you shall be paid by the return to you of your road and of "all rolling stock and material" which was your "property before the war."

This error of the appellant leads naturally into another. On page 12 they say "there never was any demand made upon any department of the Government, nor any proceeding instituted to recover this money within six years *after the conversion.*" The appellant thus wholly ignores the several demands made *before the conversion.*

Surely the learned counsel for the appellant will not contend, if the title to this iron was vested in the railroad company when the government sold it, that the company could not have maintained a suit in the Court of Claims to have recovered its value, and that the government would not be estopped from claiming that that value was less than the amount for which it sold.

Is it not clear that the title was in the company when the sale took place, about January 9, 1866 (Record, foot of page 15)? And is not the conclusion reached by the Court of Claims, as set out in the syllabus quoted in this brief, on top of page 11, a correct one, to wit: That "the offer of the War Department in 1865 to turn over the Southern railroads to their owners, with 'all rolling stock and material,' when complied with and carried into effect, must be regarded as a contract?"

On the question of limitations, the appellee begs leave to add to the authorities quoted in its brief the following:

United States vs. State of New York, 160 U. S. 615.

Upon the question of the sufficiency of the demand, discussed at the foot of page 13 of the appellant's brief, the appellee relies upon the views presented on pages 14 and 15 of its brief.

Respectfully submitted,

FRANK P. CLARK,

Attorney for the Winchester and Potomac Railroad Company, Appellee.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 195.

UNITED STATES, *Appellant*,

vs.

THE WINCHESTER AND POTOMAC RAILROAD COMPANY, *Appellee*.

Appeal from the Court of Claims.

Supplemental Brief on Behalf of the Appellee.

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By leave of this Honorable Court, first obtained, the following additional points are respectfully submitted for the consideration of the Court.

Sufficiency of the Demand.

In considering this point, the *dates* of the orders of the Government, and the action taken thereon by the company, should be carefully noted; they are as follows:

1. The offer of the Government to surrender the railroads in the Southern States and with them the "rolling stock and material, the property before the war of" said "railroads," which embraced the iron in suit, was **July 26th, 1865.** (Record, pages 6, 7 and 8.)

2. This offer was accepted by this company **November 16th, 1865.** (Record, page 10.)

3. Requests for the return of the road—*first*, an oral request, and, *second*, a written request, were made **November 16th, 1865** (Record, page 10); *third*, a written request for the *return of the iron was specifically* made **November 16th, 1865** (Record, page 12); *fourth*, a written request for the return of the road was made **December 5th, 1865.** In connection with which, see statement of Quarter-Master-General. (Record, top of page 16.)

Thus, we see, that there were *four* demands, three for the return of the road and *one* specifically for the return of the iron.

4. The road was ordered to be turned over to the Company December 14th, 1865. (Record, page 11, top of page.)

5. The iron was sold *sometime* in December, 1865, or January, 1866, the Record does not show precisely when; says the Quarter-Master-General, page 15, bottom of page. "In December 1865 and January 1866, Captain H. L. Robinson, A. Q. M. U. S. military railroads, * * sold at auction the accumulation of railway rolling stock and material at Alexandria. * * * The Winchester and Potomac Railroad iron was, it is believed, included in this sale," it was paid for January 9th, 1866. (Record, page 13, top of page.)

6. The lease to the Baltimore and Ohio R. R. Co. was made January 1st, 1866. (Record, page 12.)

7. The road was actually turned over January 16th, 1866. (Record, page 12, Finding 7.)

Now it will be observed that the request for the transfer of this road was that it be "on the same terms on which other railroads had been transferred." Such is the statement of the Secretary of War himself, (Record, page 10). What were these "terms"? They are set out on

pages 6 and 7 of the Record; one of them being the return of "all rolling stock and material, the property before the war, of the railroads," and on these terms the Virginia railroads *had been*, certainly most of them, returned. (Record, page 16, bottom of page, and page 17.)

It is therefore respectfully submitted that each one of the above four separate demands embraced this iron. If so it surely was a sufficient "presentation" of the claim. But right here, says the learned counsel for the Government, arises the difficulty about this as a demand. It is not a demand, it is but a "letter of inquiry," and in no sense "the lodgment of a claim." (Appellant's brief, page 13.) And during the closing argument of the counsel for the appellant, his Honor, Judge Harlan, as I understood him, put the query: has the Court of Claims jurisdiction in this case if this was a demand for the *return of property?* I should have valued the opportunity of answering this point in my oral argument, as the reply that I now submit promptly occurred to me, but this was impossible, and I now respectfully ask the Court's patient consideration of the same.

My contention is that the offer of the Government when *accepted* by the company established contractual relations between the two. Then it was that the minds met, and the agreement went into effect *and thereafter the Government could not change the status until the final consummation of the agreement. And if it did change the status, the demand attached still, and if the property was converted into money it became ex aquo et bono a demand for the money.*

Whatever rights were acquired on December 14th related back to November 16th.

As viewed by the Honorable Court below, they were as follows:

1. "The offer of the War Department in 1865 to turn over the southern railroads to their owners, with '*all rolling stock and material*' when complied with and carried into

effect must be regarded as a contract." (27 Ct. of Cl. 494.) But does the Honorable Court below go far enough? Did not the contract have its beginning as soon as the minds met? Says Mr. Anson, in his able work on contracts, perhaps the most recent of the great works on contracts, at page 22, a "*contract is formed by the acceptance of an offer. When the offer is accepted, it becomes a promise. * * * Acceptance is necessarily irrevocable, for it is acceptance which binds the parties.*" The *right* to the iron then vested on November 16th; it was then that the "acceptance of the offer" was given.

What then were the rights of the company at this time? They were that this property should be held *for their account*, and either delivered up to them when the "deal" (may I be pardoned for using this word, which, though homely, is without an exact synonym) was consummated, and if sold, then that the proceeds of sale should be surrendered to them.

Now, with this light shed upon the case, what do the above four demands become? Must they not be held to be demands for the property, if it existed in kind, and if sold, then demands for the proceeds of its sale?

Must they not be held to be continuing demands, demands for the substance, for the property or its equivalent, and continuing until the one or the other might be surrendered to the company?

These demands by the company are not declarations in replevin, they are the "presentation" of the claim of the company "in an informal manner." (Vd. Syllabus in this case, 27 Ct. of Claims, page 494.)

Surely, this exalted tribunal will not sanction such a construction of its own decisions as to sustain a point so technical as to defeat a claim which the Quarter-Master-General, the Secretary of War and the Court of Claims, (a tribunal whose officers are all appointed by the Government,) have each and every one of them, after careful

consideration of the same, pronounced a just debt of the Government.

Now, it is true the Court in all the cases touching this point have said that "the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such case the statement of the facts, upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously and in due time been presented at the proper department for settlement."

Let us examine this statement of facts as it appears in the petition.

1st. Is the allegation of the Company's incorporation.

2d. The ownership of its road.

3d. The seizure of its road by the Government.

4th. That its capital stock was largely owned by loyal citizens.

5th. The substitution of the Manasses rails for the old strap rail.

6th and 7th. Set forth the Executive orders, and their terms.

8th. The company's acceptance of these terms.

9th. Sets out the company's search for and discovery of the iron. That it made demand for it. That before the demand was complied with the iron was sold, yielding $30,387.99.

10th. The controversy between the company and the Manasses company.

11th. That the company had been diligently pressing its claims from the first presentation of it in 1865, and the transmittal of it to the Court of Claims.

Wherefore it prays judgment for the above sum of money, $30,387.99.

Apply now the language of the Court to this state of facts. To what date does it mean that "the filing of the petition should relate back?"

Is the word "date" to be confined severely to November 16, or does it take in the whole transaction from November 16th to January 16? I think this can be determined by the subsequent language—"the statement of facts * * is only another mode of asserting the *same demand*."

What demand? Why surely the demand, whilst specifically for the iron, is, nevertheless, a demand for relief. Was it not broad enough to have warranted the Executive Department in paying the money over for which the iron sold? Can it be imagined, had no difficulty intervened which prevented such payment, that the department would have said to Mr. Conrad—Yes, we would pay you the money, but your demand is for the iron, and, *therefore*, we cannot pay you the money!

It will be noted that there is not an allegation in the petition that is not what the original demand would have been had it been supposed, at the time that it was made, that it should be couched in formal phraseology, and that a demand for the property would be held not to be good as a demand for the money into which it had been converted.

The learned Chief Justice of the Court of Claims, in passing on this point, says:

Syllabus "III. When it appears by the records of the Executive Department that a claim referred under the Revised Statutes, section 1063, was presented to the department within six years, *though in an informal manner*, it is not barred." (Italics mine.) If a man has my horse, and sells it under stress of circumstances, which make it to his interest as well as mine that he should sell it, and that without my knowledge or consent, and I make a demand for its return, would it not be, as between man and man, a violent perversion of the import of language

to say, that a ~~claim~~ demand for the horse could not be construed to be a ~~claim~~ demand for the money realized from its sale? And if such would be the import of such a demand as between man and man, has not this Court held, time and again, that the rules governing the construction of transactions between a citizen and the Government must be the same as those which govern between man and man?

Of course if this property now existed in kind, and this were a suit to recover it in kind (a suit in replevin), the Court of Claims would not have jurisdiction. But it is not such a suit; it is a suit to recover a specific sum of money, and the original demand was, whilst in form a demand for property, nevertheless, in fact and in substance, a demand for what was "coming to" the company, whether in property or in money.

On this question of the sufficiency of the demand, the attention of the Court is respectfully asked to the following, taken from the opinion of the Court below:

"This brief statement * * * shows the claimants to have a meritorious cause of action, and that they are entitled to recover unless their claim is barred by the Statute of Limitations * * *.

"As early as November, 1865, the claimant made application for a return of the iron. Without questioning the claimant's right to the same, but, apparently, while negotiations were pending with the Baltimore and Ohio Railroad Company, for operating the road, the matter was *postponed.*

* * * * * * * *

"The Baltimore and Ohio R. R. Co., by its president, wrote to the Quarter-Master-General on the subject, and received a reply of facts, *disclosed*, it must be assumed, by the records of his office. Some years after that, the same company formally presented a claim to the War Department for the money for which the rails had been sold.

"This was referred to the Quarter-Master-General, who made a report December 7, 1885, *treating the claim as the same presented for the iron in 1865, and as still pending* in the Department. He reported that 'the claimant is entitled to the relief which the circumstances of the case seem to justify.'"

One word more in reply to the contention of the learned counsel for the appellee, that, even if the demand be held to be good as a demand, it was prematurely made.

Can it be material as to the exact time when the demand was made in order to constitute it a sufficient presentation of the claim?

Note Mr. Conrad's language: "We are anxious to recover" our iron, "as we hope the road is about to be returned to the company"—and we, therefore, "respectfully request * * * that an order be made to return" the same.

What can be clearer than that the whole matter had been agreed on between the Secretary of War, Quarter-Master-General and Mr. Conrad, and that at all the various interviews between them, the company, through its president, was pressing its claim not only for the road, but for this iron as well?

And in this state of facts would it not be a violation of the spirit of all of the various decisions of this Court to hold that this was not a sufficient presentation of this claim, because it was made before and in contemplation of the happening of an event instead of after its occurrence?

It is not, of course, admitted that the right did not attach before December 14. On the contrary, as I have heretofore in this brief contended, it is claimed that the right attached *eo instante* upon the acceptance of the Government's offer, which was clearly before this specific request for the iron was made.

THE SECRETARY OF WAR AND QUARTER-MASTER-GENERAL HAVING APPROVED THE CLAIM, AND THE FORMER HAVING ORDERED IT TO BE PAID, SUCH ACTION WAS CONCLUSIVE UPON THE THIRD AUDITOR AND COMPTROLLER.

That the Quarter-Master-General approved the claim (see Record, foot of page 17), and that the Secretary of War ordered it to be paid (see Record, page 18.)

That this action is conclusive upon the Third Auditor and Comptroller,

See—United States vs. Jones, 18 Howard, 92.
Totten vs. United States, 92 U. S. 105.
United States vs. Waters, 133 U. S. 216.

One point more is respectfully submitted for the consideration of the Court.

THE RAILS IN QUESTION WERE A PART OF THE FREEHOLD, AND WERE REMOVED THEREFROM BY THE UNITED STATES AUTHORITIES, AND NO CONDEMNATION PROCEEDINGS WERE EVER INSTITUTED TO CONDEMN THEM.

Being real estate, their removal did not alter their nature in this regard, and the company's title in the absence of a decree of condemnation was never divested.

If this be so, the demand therefor on the 16th of November, 1865, was a good demand, and a sufficient presentation of the claim, and upon the conversion of the property by the company to its own use, the Court of Claims had jurisdiction to entertain a petition based upon an implied promise to pay its value.

Respectfully submitted,

FRANK P. CLARK.

Attorney for the Winchester and Potomac Railroad Company, Appellee.